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No. 85-1186-CFX
Status: DECIDED

Title: R. C. Sampson, Petitioner
v.
Emma F. Gilmere, Individually and as Administratrix of the Estate of Thomas E. Patillo, etc.

Docketed:
January 10, 1986

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Cooney, Mary Carole

Counsel for respondent: Raffauf, J.M.

Entry	Date	Note	Proceedings and Orders
1	Jan 10 1986	D	Petition for writ of certiorari filed.
2	Feb 12 1986		DISTRIBUTED. February 28, 1986
3	Mar 5 1986	P	Response requested. (Due April 4, 1986 - NONE RECEIVED)
4	Apr 2 1986		Brief amicus curiae of Georgia filed.
5	Apr 12 1986		Brief of respondent Emma Gilmere, etc. in opposition filed.
6	Apr 16 1986		REDISTRIBUTED. May 2, 1986
7	Apr 16 1986		REDISTRIBUTED. May 2, 1986
9	May 5 1986		REDISTRIBUTED. May 15, 1986
10	May 5 1986		REDISTRIBUTED. May 15, 1986
11	May 19 1986		Petition DENIED. Dissenting opinion by The Chief Justice with whom Justice O'Connor joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

NO. (1)

Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1186

IN THE

Supreme Court of the United States

October Term, 1985

R. C. SAMPSON

Petitioner,

v.

EMMA F. GILMERE, Individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the use of deadly force by a police officer acting in the mistaken belief that a suspect poses a threat of serious physical harm, as a matter of law, violates substantive due process rights, and states a federally cognizable claim pursuant to 42 U.S.C. Section 1983, regardless of the procedural protections available under state law.

2. Whether the use of deadly force in self-defense, as opposed to the use of deadly force to secure a detention, violates rights secured by the Fourth Amendment.

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2. The Court of Appeals erroneously held that the use of deadly force in a subjective fear of bodily injury is an unreasonable seizure in violation of the Fourth Amendment, which holding misapplies by overextension the Supreme Court's decision

in Tennessee v. Garner, ___ U.S ___, 105 S.Ct. 1694 (1985), and conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985), thus raising a significant and recurring question of federal law 15

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. ______________

R. C. Sampson .... Petitioner

v.

Emma F. Gilmere, individually
and as Administratrix of the
Estate of Thomas E. Patillo
and for the benefit of his
next of kin .... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, R. C. Sampson, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in Emma F. Gilmere, individually and as Administratrix of the Estate of Thomas E.

Patillo, and for the benefit of next of kin v. City of Atlanta, Georgia, et al., entered October 15, 1985.

OFFICIAL REPORTS FROM COURTS BELOW

The opinions of the United States District Court, Northern District of Georgia, entered June 21, 1982 and August 6, 1982, are reproduced at Appendix I hereto, page 1a, _infra_. The opinion of the three-judge panel of the United States Court of Appeals for the Eleventh Circuit, entered on July 9, 1984, is reproduced at Appendix II hereto, 90a, _infra_. The opinion of the United States Court of Appeals for the Eleventh Circuit, sitting _en banc_, entered October 15, 1985, is reproduced at Appendix III hereto, 160a, _infra_.

GROUNDS FOR INVOKING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner seeks to have the Court review the Order of the United States Court of Appeals for the Eleventh Circuit entered on October 15, 1985. This petition for certiorari is filed within 90 days of that order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The plaintiff brought this action for damages as administratrix of the estate of a man who was shot and killed by a City of Atlanta police officer acting upon the good faith but mistaken belief that the man had seized a dropped gun and was threatening the officer's life. She named as defendants the municipal corporation, the individuals who served as its mayor, commissioner of public safety, chief of police, and two police officers. The action was brought under 42 U.S.C. §1983 and 1988, and also alleged pendent state law claims for false imprisonment, false arrest and assault and battery. The case was tried to the district court of the Northern District of Georgia, Atlanta Division, in August, 1981.

At the close of the plaintiff's case, the defendants moved for dismissal pursuant to Fed. R. Civ. P. 41(b). Although the court declined to render judgment at that time, after the close of all the evidence it asked the parties to brief the issue whether plaintiff's claim under 42 U.S.C. §1983 was barred by the doctrine of Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 420 (1981). The parties did so.

On June 21, 1982, the trial court issued its finding of fact and conclusions

of law which will be summarized here, and are set forth in full in Appendix I. As a matter of fact, the court found that the Petitioner and a fellow officer encountered plaintiff's decedent, Thomas Patillo, at his home in response to a citizen's call that Patillo had threatened that citizen with a gun. The officers ordered Patillo to their police cars for questioning. Patillo, who was very drunk, attempted unsuccessfully to flee. The officers then escorted him forcibly across a parking lot and, according to eyewitnesses, hit him about the head. As the three men reached a point between two parked cars, Patillo tried once more to break away, and reached for the revolver of one of the officers. Although reports of what happened next differed sharply, the trial court found that the revolver was knocked to the ground during a scuffle. Patillo, who had broken free, then lunged toward Petitioner, who reacted by drawing his own revolver and shooting Patillo fatally. The trial court further found that Petitioner was attempting to protect himself, and was acting in subjective good faith (39-40a) when he shot Patillo, but that his belief that his life was in danger was not reasonable (41a).

As a matter of law, the trial court held that the municipality, the Petitioner, and his fellow officer had intentionally deprived Patillo of a protected liberty interest, the right to be free from the infliction of unnecessary physical force by state officers against one's person (the court construed plaintiff's complaint as not claiming damages for the deprivation of Patillo's life, see text at 75-89a), and that this deprivation occurred both when Patillo was struck about the head and when he was shot. The plaintiff's claims under

Fourth and Eighth Amendments, and her state law claims were denied. No liability was found on the part of the supervisory officials named as defendants. The court did not discuss the issue of subject matter jurisdiction, as briefed by the parties, nor make a determination whether substantive due process protections were violated.

Petitioner and the City of Atlanta appealed this decision to the United States Court of Appeals for the Eleventh Circuit, and the plaintiff cross-appealed. A three-judge panel of the appellate court, _inter alia_, reversed the trial court as to the finding of liability against the City of Atlanta and held that _Parratt_, _supra_, precluded plaintiff's claims against the police officers, because the deprivation, although under color of state law, was caused by a random and unauthorized act for which prior process was impracticable and impossible, and because post-deprivation remedies under state tort law were available to provide redress for the beating and the shooting. The panel affirmed the trial court's holding that the plaintiff did not state a claim for violation of any substantive guarantees of the federal Constitution, and found that the acts of the police officers did not so "shock the conscience" as to violate substantive due process guarantees.

A suggestion for rehearing en banc was filed on behalf of the plaintiff, and was granted. The rehearing took place on January 21, 1985. On October 15, 1985 the United States Court of Appeals for the Eleventh Circuit entered its order. A majority of the en banc panel found that Parratt did not preclude the plaintiff from bringing a §1983 action against the police officers because a basis of liability could

be found in state tort law, and additionally held that there are two constitutional theories, neither of which were considered in Parratt, by which liability under §1983 in the instant case could properly be predicated. Using the standards set out in Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert den., 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973), the en banc panel questioned whether the district court's findings established a constitutional violation so egregious as to "shock the conscience," but concluded that because Petitioner's legitimate fear for his life resulted from his improper use of his official power when he struck Patillo, liability on substantive due process grounds was justified. The majority further found the beating and shooting of Patillo to be actionable under the Fourth Amendment, grounding this conclusion on

Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The Honorable Gerald Tjoflat, Circuit Judge, filed a separate opinion dissenting from the majority's finding of a Fourth Amendment violation, on the basis that the shooting resulted from Petitioner's reasonable belief that his life was in danger, and was not an unreasonable seizure. He was joined by Circuit Judges Roney and Fay in his dissent from the majority conclusion that Patillo's substantive due process guarantees were violated, finding instead that the Fourth Amendment was intended to be the sole constitutional vehicle for regulating police-citizen encounters. The Honorable Frank M. Johnson, joined by The Honorable Joseph W. Hatchett, dissented from the majority opinion as to municipal liability. The Honorable James C. Hill, Circuit Judge, filed a dissenting opinion,

construing plaintiff's claim as being for deprivation of procedural due process under the Fourteenth Amendment, and not as being a Fourth Amendment claim.

GROUNDS FOR ALLOWANCE OF WRIT OF CERTIORARI

1. THE COURT OF APPEALS ERRONEOUSLY HELD THAT THE USE OF DEADLY FORCE IN A SUBJECTIVE FEAR OF BODILY INJURY IS A VIOLATION OF SUBSTANTIVE DUE PROCESS, WHICH HOLDING CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN YOUNG V. CITY OF KILLEEN, TEXAS, 775 F.2d 1349 (5th Cir., 1985)

The U.S. Court of Appeals, in its en banc opinion dated October 15, 1985, held that the shooting at issue here was conduct that so "shocked the conscience" as to meet the broadly-worded standard established by

Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), for showing a violation of the victim's right to substantive due process. Its conclusion presented yet another approach to the issue of the degree of culpability required to state a claim for violation of substantive due process guarantees under §1983, and conflicts with a decision of the U.S. Court of Appeals for the Fifth Circuit which considered a set of similar factual circumstances. In Young v. City of Killeen, Texas, 775 F.2d 1349 (5th Cir., 1985), the Court of Appeals for the Fifth Circuit ruled that a police officer's use of deadly force was not a constitutional violation if the officer had reason to believe that there was a threat of serious physical harm, even though the officer may have created the situation where the danger of such a mistake would exist. The basis for

this holding was the court's determination that there must exist an element of abuse of government power if tortious harm is to be raised to the level of a constitutional violation, and that such abuse did not exist where the officer held a good faith belief in the legality of his actions.

In doing so, the court relied on this Court's recent ruling in Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The Young ruling was also consistent with the seminal ruling by the U.S. Court of Appeals for the Second Circuit in Johnson v. Glick, 481 F.2d 1028 (2d Cir., 1973), cert den., 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973), which applied the Rochin standard to §1983 actions. One of the several factors which separate acts reaching constitutional dimensions from those which merely constitute torts, as articulated by Judge Friendly, include "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." 481 F.2d, at 1033. That factor was determinative in the analysis made by the U.S. Court of Appeals for the Sixth Circuit, sitting en banc in Wilson v. Beebe, 770 F.2d 578 (6th Cir., 1985), where it held that actions by a police officer contrary to his training and resulting in the discharge of his revolver and in grievous injury to a detainee, did not amount to a violation of substantive due process because they were not a purposeful infliction of injury.

The en banc opinion dated October 15, 1985, at issue today, would greatly expand the use of the theory of substantive due process in §1983 actions involving police-citizen encounters by focusing on only one

of the factors articulated in Glick, the extent of the injury inflicted, to the exclusion of another criterion of Glick, the purpose of inflicting such force. Not only will this use expand the scope of 42 U.S.C. §1983, it will result in conflict among the circuits as to the standards for using substantive due process theory.

Other aspects of the issue of the degree of culpability required to state a claim for violation of substantive due process guarantees under Section 1983 are presently pending before this Court in the cases of Davidson v. O'Lone, 752 F.2d 817 (3rd Cir., 1984), cert. granted, 105 S.Ct. 2673 (1985), and Daniels v. Williams, 748 F.2d 229 (4th Cir., 1984), cert. granted, 105 S.Ct. 1168 (1985).

2. THE COURT OF APPEALS ERRONEOUSLY HELD THAT THE USE OF DEADLY FORCE IN A

SUBJECTIVE FEAR OF BODILY INJURY IS AN UNREASONABLE SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT, WHICH HOLDING MISAPPLIES BY OVEREXTENSION THE SUPREME COURT'S DECISION IN TENNESSEE V. GARNER, ___ U.S. ___, 105 S.Ct. 1694 (1985), AND CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN WILSON V. BEEBE, 770 F.2d 578 (6th Cir. 1985), THUS RAISING A SIGNIFICANT AND RECURRING QUESTION OF FEDERAL LAW.

The court below concluded that the police officer's shooting, based on his mistaken belief that the suspect had seized a gun and threatened the officer's life, constituted an unreasonable seizure in violation of the Fourth Amendment. The plaintiff alleged excessive force in the shooting while the officer argued self-defense. The trial court found as a matter

of fact that the officer subjectively believed he was threatened but such belief was not reasonable.

In the case of Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this Court concluded that the use of deadly force to secure the detention of a fleeing felon, absent any threat to the police officer or to others, was an unreasonable seizure. Such application of the Fourth Amendment to instances of using deadly force to secure the detention of persons has been followed in Acoff v. Abston, 762 F.2d 1543 (11th Cir. 1985) (officer shot burglary suspect to apprehend him) and Kibbe v. City of Springfield, ___ F.2d ___ (1st Cir. 1985) (officers shot at automobile to stop fleeing suspects).

The Fourth Amendment right to be free from unreasonable search and seizure is not violated by a police officer's conduct involving self-defense rather than detention of the complained force, the Court of Appeals for the Sixth Circuit has held that the Fourth Amendment has no application, but rather the matter is subject to substantive due process consideration. Wilson v. Beebe, 770 F.2d 578, 586 (6th Cir. 1985). Similarly, the case at bar concerned deadly force as self-defense and not as the means to detain. Yet the court below applied the Fourth Amendment as well as the Fourteenth Amendment thus conflicting with the Sixth Circuit interpretation.

The shooting issue must be considered under the Fourteenth Amendment upon the standards of substantive due process or as a common law tort claim. Otherwise, the decision below grants federal Fourth Amendment consideration to every ordinary common law tort by policemen contrary to the

decisions of this Court limiting the application of 42 U.S.C.A. §1983 and the United States Constitution. Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L. Ed. 2d 711 (1977); Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

Thus, the case at bar raises an issue that has been given conflicting interpretations by at least two United States Courts of Appeal. Furthermore, the decision below broadly applies the Fourth Amendment to police activity to which that Constitutional provision should not be applicable. This Court has not decided this important question of federal law and this case provides this Court with an opportunity to settle the matter.

For the foregoing reasons, it is submitted that a Writ of Certiorari should issue to review the October 15, 1985 decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA F. GILMERE,

Plaintiff,

v.

CITY OF ATLANTA, et al.,

Defendants.

CIVIL ACTION NO. C80-181

ORDER

On New Year's Day, 1980, Thomas E. Patillo was shot and killed by R. C. Sampson, a police officer employed by the City of Atlanta. Plaintiff Gilmere, Patillo's sister and the administratrix of his estate, brought this action on behalf of Patillo's estate and "for the benefit of his next of kin," his eight brothers and sisters. Defendants are the City of Atlanta, individuals who served as its Mayor, Public Safety Director and Chief of

Police on January 1, 1980, and two of its police officers, Sampson and C. C. Craig. This action was brought under 42 U.S.C. §§ 1983 and 1988, for violations of Patillo's civil rights, and also contains pendent state law claims for false imprisonment, false arrest and assault and battery. The case has been tried to the Court without a jury and this Order constitutes the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

FINDINGS OF FACT

1. The Death of Thomas Patillo

Thomas Patillo, a black 38 year old male, spent the afternoon of January 1, 1980, visiting various friends and relatives. He did some drinking on these visits. Late in the afternoon, he invited some friends to visit his apartment at 1643 Bankhead Highway in Atlanta. He drove to

his apartment with a friend, James Beebe, and arrived on his block at approximately 5:00 p.m.

Before entering his driveway, Patillo stopped at a filling station across the street from his apartment. After purchasing gasoline, Patillo pulled out from the station into the street. As he did so, a red van swerved around his car. After the van had passed, Patillo drove his car across the street and into his own driveway. As he and Beebe were standing near the car, the red van returned. Its driver and Patillo exchanged words. The van drove away and Patillo and Beebe entered Patillo's apartment. Several friends soon joined them there.

The driver of the red van apparently called the police and reported that Patillo had threatened him with a gun. The police dispatcher asked by radio for an available officer to investigate. The radio call simply said that there was a report of a man with a gun at a certain location. Sampson responded that he would investigate and Craig responded that he would back up Sampson. A later radio call apparently told Sampson to meet the driver of a red van at an intersection near Patillo's apartment. Sampson is black, while Craig is white; on January 1, 1980, Sampson was 28 years old and Craig was 24.

The driver of the red van told Sampson he had almost collided with a blue car, and after the near-accident the driver of the blue car had threatened him with a gun pulled from his trunk. The driver of the blue car then returned the gun to his trunk, Sampson was told. Sampson asked where the other driver was, and the complainant pointed out Patillo's car and apartment. Craig arrived, and Sampson told

him that they were going to investigate the owner of the blue car.

Sampson, Craig and the driver of the red van stepped up on the porch of Patillo's apartment. Both officers had left their nightsticks in their patrol cars. A visiting friend answered Sampson's knock, and Sampson asked for the driver of the blue car. Patillo was called in from another room. When Patillo came to the door, the driver of the van identified him by saying, "That's him. He's the one." The driver of the red van disappeared in the ensuing confusion and was never located by the police.

When asked by Sampson, Patillo stated that he owned the blue car and asked what the officers wanted. Sampson said that they wanted to talk to him and Patillo invited them in. There were several people in Patillo's living room, however, and

Sampson asked Patillo to step out on to the porch. Patillo did so and the officers noted from his breath and his gait that he had been drinking. George Burden, a visiting friend, followed Patillo on to the porch and asked the officers, "What are you going to do with him?" Sampson then decided to question Patillo away from the house, told Burden the officers were conducting an investigation and needed to question Patillo, and asked Patillo to come with them. The officers did not tell Patillo or Burden the nature of the investigation. They did not frisk Patillo, or tell him he was under arrest.

Both Craig and Sampson testified, and the Court finds, that the officers did not intend to arrest Patillo. They were conducting an investigation, and merely intended to question him. Their intentions

did not change throughout their encounter with Patillo.

As the trio left the porch, Sampson grabbed Patillo to steady him. Upon reaching the sidewalk, Patillo told Sampson he could walk, and Sampson let him go. Patillo then made an attempt to run, taking a few quick steps and staggering backward. Sampson caught him easily and grabbed the back of his belt to hold him. Craig, a few steps behind, caught up and grabbed Patillo's arm. Patillo began jerking his arms; the officers began trying to control him by holding on to his arms. This was not too difficult, however, as Patillo was fairly drunk.

Next door to Patillo's apartment was a commercial building then being used as an ice cream parlor. The ice cream parlor, which was located at the corner of Bankhead Highway and Florence Street, had a small parking lot along its Florence Street side. Several cars, including Craig's patrol car, were parked in this lot. These cars were parked parallel to Bankhead, with their front ends pulled up to the side of the ice cream parlor; Craig's patrol car was the third car from Bankhead. Craig and Sampson guided Patillo down Bankhead past the ice cream parlor and turned him in to the parking lot. Burden and his son Donald followed them, with the elder Burden yelling at the officers to let Patillo alone.

Several persons watched Patillo and the officers as they walked down Bankhead and into the parking lot. These people included George Burden and his son Donald, who had followed Patillo from the apartment, Patty and Cheryl Burkes, sisters who had stopped at the gas station across the street, and Robert Horton and Marvin Lumpkin, the employees on duty at the gas

station. Horton and Lumpkin were acquainted with Patillo, who also was employed at the filling station as a tow truck operator and tire repairman. All of these witnesses testified that Patillo and the officers were struggling. Donald Burden further testified that Craig was beating Patillo about the head as they walked, and Patillo was merely trying to defend himself. Pattie Burkes testified that as the trio left the sidewalk, she saw the officers' hands up in the air, coming down on Patillo as if they were beating him. The officers denied having struck Patillo. The Court, relying in particular on Pattie Burkes' testimony, finds that the officers did strike Patillo a number of times as the group walked across the parking lot. Since there was no testimony explaining or justifying these actions, the Court concludes the officers' actions were unprovoked by

Patillo, and were unnecessary to control him.

The trio proceeded into the parking lot and past the rear of the two cars parked between Craig's patrol car and Bankhead. Patillo was not a large man; the Medical Examiner's Report listed his height as 5'9" and his weight as 130 lbs. See Ex. P-21 at 2. Sampson is approximately the same height and weighs about 150 lbs. Craig is slightly shorter, but on January 1, 1980 he weighed about 250 lbs. The level of alcohol in Patillo's bloodstream was later found to be .27 g.%. See Georgia Bureau of Investigation Crime Lab Report, Ex. P-25. This level is considerably above the .10 level which creates a presumption of intoxication under Georgia law, see Ga. Code Ann. § 68A-902.1(b)(3), and Patillo's intoxication was confirmed by his staggering on his porch and later on the sidewalk

as he tried to escape. Despite Patillo's intoxication and the considerable weight advantage of the officers, Patillo somehow broke free or was released as the trio approached the patrol car. At this point, the trio had just passed the rear of a Camaro, the second of the two cars separating Craig's patrol car from the Bankhead sidewalk, and they were turning into the area between the Camaro and the patrol car. The fatal struggle that ensued occurred between these two cars, which were parked side-by-side, in the space between the right rear tire and trunk panel of the patrol car and the left rear tire and trunk panel of the Camaro. See Ex. P-5, a photograph of this scene.

Craig testified that as Patillo broke free, he grabbed the collar of Craig's jacket and pulled it up over his head, temporarily blinding and immobilizing

Craig. When Craig pulled the jacket the rest of the way off, he found himself next to Patillo facing the side of the patrol car. He testified that Patillo then put his hand on Craig's gun in its holster. Craig put his right hand on top of Patillo's in an attempt to immobilize it. According to Craig and Sampson, Sampson then added his hand to the stack, and Craig tried to do the same with his left hand. The officers testified that Patillo managed to jerk the gun free. Craig said he then pushed Patillo's hand straight up, causing Patillo to fall back against the trunk of the patrol car, while Craig dove for cover and shouted, "He's got my gun." Sampson testified that Patillo began to lower the gun from its position over his head, and to level it at Sampson. Sampson then drew his own revolver and fired twice at Patillo as

Sampson fell away out of the line of Patillo's weapon.

Most of the witnesses were located at some distance from the trio; during most of these events, the Burkes sisters, Lumpkin and Horton were across Bankhead, while the Burdens were on the Bankhead sidewalk at the edge of the parking lot. Furthermore, these events occurred during the twilight hours. None of the witnesses could be certain that Patillo broke away from the officers; some suggested that he was released. None of the witnesses recalled seeing Patillo pull Craig's jacket over his head. Lumpkin testified that Craig pushed Patillo away, and George Burden testified that Craig struck Patillo and sent him staggering in the direction of Sampson. None of the witnesses saw Patillo reach for Craig's revolver, and none of them saw a gun in Patillo's hand at any time.

After considering this conflicting testimony, the Court concludes that the officers were striking Patillo as he tried to break away. When he did break away, he reached for Craig's revolver. In the ensuing scuffle, the revolver was knocked to the ground. At that point, Patillo lunged towards Sampson, who reacted by drawing his own revolver and shooting Patillo twice at close range in the abdomen.

The Court has noted Sampson's testimony to the effect that Patillo took Craig's revolver, raised it in the air and was lowering it toward Sampson when Sampson fired his own revolver. The Court does not accept this testimony, which is inconsistent with that of numerous other witnesses.

After Patillo was shot he collapsed face forward onto the parking lot. Donald

Burden testified that Craig drew his revolver, momentarily pressed it into Patillo's hand, then reclaimed it, and began waving it at the gathering crowd. Craig testified that he took Patillo's pulse, picked up his revolver from where it had fallen and holstered it while Sampson called for an ambulance on Craig's patrol car radio. The Court accepts Craig's testimony that he was merely checking Patillo's pulse.

A large crowd of onlookers and friends of Patillo gathered, and some, especially George Burden, were not friendly. The officers ordered the crowd away from the scene, and refused to let anyone touch Patillo. At one point, one or both officers drew a gun and ordered the crowd to stay back. Neither Sampson nor Craig turned Patillo over to examine his wounds, despite the fact that Craig had found a slight pulse when he checked immediately after the shooting. Eventually additional police arrived, as did the ambulance. Patillo was taken to Grady Memorial Hospital, where he was pronounced dead 30 minutes after he arrived.

Detective W. D. Swinney of the Department's Homicide Division arrived at the scene at 6:15 p.m. Swinney was involved in a serious automobile accident on the eve of trial in this case and did not testify; however, his deposition and his report are in the record.

The body of Patillo was removed before Swinney's arrival. When Swinney arrived, he spoke with Sampson and Craig first. Because of the presence of a hostile crowd, he instructed them to go to the Homicide Office and wait for him there, Ex. P-1 at 14; Swinney took statements from the officers late that night. At the scene,

Swinney and another detective then located eight witnesses. All or most of these witnesses were taken to the police station, where their statements were recorded. These witnesses included four of the eyewitnesses who testified at trial (the Burdens and the Burkes sisters), but did not include two others (Lumpkin and Horton). Five of the eight witnesses (Beebe, both Burdens, Cheryl Burkes and James Bailey) stated that the officers had beaten Patillo without provocation while walking him to Craig's patrol car. None stated they had seen a gun in Patillo's hand.

The Georgia Bureau of Investigation Crime Lab Report indicated that Sampson's gun was in contact with Patillo's clothing when one of the two shots was fired. Ex. P-25 at 2. The gun was in "near contact" at the time of the other shot. Id.

Examination of Craig's weapon revealed fingerprints. These fingerprints did not match Patillo's. See Ex. P-1 at 18. Examination of Patillo's hands revealed the presence of barium and lead, two components of gunshot residue. See Ex. P-21. Richard Earnest, a Firearms Examiner with the Georgia State Crime Lab, testified that this residue could have resulted from the holding of a gun or from the hands being near a gun when it was fired. Craig's revolver was never fired during the struggle, and there is no evidence regarding when it was last fired. Donald Burden testified that Patillo had fired a pistol on New Year's Eve, the night before his death.

Swinney's report for the Homicide Division was passed on to the Internal Affairs Division, which reviewed it and exonerated Craig and Sampson. The Firearms

Review Board later reviewed the incident and found no misconduct or violation of departmental rules. See Ex. P-41 at 3. Nor did the Fulton County Grand Jury recommend any action against Sampson and Craig. There was also some evidence that the Federal Bureau of Investigation inquired into the incident and cleared the officers.

At the time of his death, Patillo was 38 years old, see Ex. P-46, and had a life expectancy of 33.97 years according to the Commissioners 1958 Standard Ordinary Mortality Table, Ex. P-45. According to his employer, Roger Boyd, Patillo was earning $125.00 per week at the time of his death, and was scheduled to receive substantial raise as of January 1, 1980. His funeral cost $4,095.53; social security paid $255.00, while his brothers and sisters paid the remaining $3,840.53. See Ex. P-6. His siblings also purchased his gravestone, at a cost of $575.00. See Ex. P-7.

2. Selection, Training and Supervision of Craig and Sampson

Sampson joined the Atlanta Police Department in 1973. A background investigation at that time revealed that he had no criminal record, but had incurred ten traffic tickets for moving violations between December 1969 and June 1972; these violations had at one time resulted in the suspension of his driver's license. See Ex. P-33. It was not the practice of the Atlanta Police Department in 1973 to administer psychological tests to its applicants, and Sampson received no such testing.

Sampson received the standard 1973 police academy training course, which he recalled as being one week on the pistol range and five weeks in the classroom.

This recollection appears to be substantially correct; see Ex. P-14, a copy of the 1970 police academy curriculum. In his testimony, Sampson had some difficulty recalling the substance of this training course.

Between 1973 and March 1978, citizens filed at least two complaints against Sampson alleging misconduct. See Ex. P-33, P-34. One of these complaints involved use of excessive force. See Ex. P-34. These complaints were investigated by the Department and Sampson was exonerated in each case. The Firearms Review Board also investigated an incident in which Sampson discharged his weapon, and the Auto Safety Committee investigated three automobile accidents involving Sampson. Again, he was cleared on each occasion. See Ex. P-31 at 2.

There are two performance evaluations regarding Sampson in the record. One covers November 1976 through March 1977, and rates Sampson as average in all eight categories. The supervisor suggested that Sampson could improve in the "public relations" area "by curbing temper...and maturing." Ex. P-36 at 2. As to "judgment," the report noted a need for improvement of Sampson's "judgment in tight situations." Id. at 4. The second evaluation, which covers April 1, 1977 to September 30, 1977, rated Sampson above average in six categories and excellent in two others, and contained no suggestions regarding the need for improvement. See Ex. P-35.

Sampson resigned from the Department in March 1978. He was an officer in good standing at that time. Despite his resignation, the Department "suspended" him in November 1978 for marijuana use while he

was a police officer. See Ex. P-31 at 1, 3. In late 1978, Sampson applied for reinstatement to the Department. Apparently because of his "suspension" he was required to take a polygraph test regarding his use of drugs. He failed the test, but insisted on a retest by another polygraph examiner. He passed the second test and was reinstated. Sampson was not given any psychological testing at his reinstatement, and received only one day of reorientation.

Some time after Patillo's death, Sampson was involved in another physical altercation with an older citizen resulting from Sampson's investigation of an illegal trash fire. The ensuing struggle resulted in the citizen's long-term hospitalization for a stroke or heart attack.

At some time after Sampson's hiring, the Department began administering psychological tests to its applicants before it decided to hire them. When Craig was hired in 1978, he underwent such testing. Craig went through the 1978 version of the police academy's training program, which he recalled as being 13 weeks long. On cross-examination, Craig described two incidents in which he had shot at persons fleeing from police, one in August 1979 and one in March 1980; Plaintiff presented no evidence that suggests that Craig was not exonerated by the investigation conducted by the Firearms Review Board in each instance.

Georgia law currently requires all police departments to give 240 hours (or six 40-hour weeks) of training to their recruits. The required curriculum is set forth in Ex. P-17. The Atlanta Police Department provides 480 hours of classroom training, and did so at the time Craig was hired. This training occurs at the police academy which employs ten full-time and 25-30 part-time instructors. A recent academy curriculum is set forth in Ex. City-5. In addition, according to Major Richard Davis, who ran the Department's training program at the time of trial, the Department provides further on-the-job training by pairing all recruits with experienced officers during their first eight weeks on the job; the experienced officer evaluates and reports on the rookie on a daily basis. This on-the-job training was instituted after Sampson's days as a recruit but before Craig's. After this field training, the officer is on probationary status for six months, and his supervisor files a monthly report on him.

Davis testified that the recruits now receive five or six hours of training regarding when to use deadly force. One instructor's "Firearms" course curriculum lists the "legal and moral limitations governing the use of a firearm" as within the scope of his course; this instructor then devotes one page of his 18-page course to this subject, or approximately the same amount of space devoted to the procedure for cleaning the weapon. *Compare* Ex. P-19 at 304 *with* *id*. at 13-14. Part of this five or six hours of training is the reviewing of several films that present certain situations to the recruit and require him to decide whether to shoot; the Court viewed one of these films in the course of this trial.

Instruction in the use of non-deadly force is given as part of the physical training and the course in the mechanics of arrest. These combined subjects presently consume about 40 hours of instruction time. One instructor's curriculum involves the showing of a film entitled "Defensive

Tactics II-the Police Baton," and this instructor specifically instructs the recruits always to wear their nightsticks. *See* Ex. City-8 at 15.

Davis changes the academy curriculum as a result of changes in the law, feedback from internal investigations of the Firearms and Accident Review Boards, and changes in departmental policy. The current curriculum described above appears to have changed relatively little since Craig went through the academy. It has changed considerably since Sampson's academy days, and there was little evidence regarding the content of the curriculum in 1973.

After an officer leaves the academy he is required to return only once a year, for one day. He spends about five hours of that day on the pistol range, requalifying with his weapon. The remaining time is spent in the classroom, being instructed in a selected area. Recent subjects taught in these three or four hours per year include physical fitness, response to hostage situations, and the "LAM" method of controlling a prisoner with the nightstick. Other continuing education courses are offered to police officers on a voluntary basis. Apparently neither Sampson nor Craig had ever taken any voluntary continuing education or retraining.

Each Atlanta police officer is given a loose-leaf binder entitled "Standard Operating Procedures," which contains the rule, regulations and policies of the Department. See Ex. P-10. This book is updated regularly and the updates are distributed to each officer. In addition, changes in departmental policy or in the law are sometimes covered in roll calls at the start of an officer's shift.

The present rule regarding the nightstick states that it "will be worn," and that "personnel may be exempt from wearing the Baton and Holder upon approval of their Division Commander." Id. § 4.07 at 54. Earlier versions of this rule apparently gave superior officers complete discretion as to whether the officers under their command were required to wear the nightstick. Craig testified that he was under the impression that the only time he was required to wear his nightstick was at roll call.

CONCLUSIONS OF LAW

1. Liability Under 42 U.S.C. § 1983

A. Officers Sampson and Craig

A cause of action under 42 U.S.C. § 1983 has two essential elements: conduct under color of state law, and a resulting deprivation of rights, privileges or immunities secured by federal law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). There can be no doubt that Craig and Sampson were acting in their official capacities as Atlanta police officers at the time of their encounter with Patillo; thus they were acting "under color of state law."

Plaintiff suggests that Craig and Sampson deprived Patillo of several rights guaranteed by the federal Constitution. Among these rights are Patillo's right to be free of unreasonable seizures and the right not to be deprived of life or liberty without due process of law.

There is much precedent for the general proposition that the use of excessive force by law enforcement officers can give rise to section 1983 liability. *See, e.g.*, *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981); *Owens v. Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied sub nom.*

County of Nassau v. Owens, 444 U.S. 980 (1979); *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975); *Knight v. Carlson*, 478 F.Supp. 55 (E.D. Cal. 1979); *Leite v. City of Providence*, 463 F.Supp. 585 (D.R.I. 1978). However, not all killings by police officers are wrongful; officers are empowered by law to use force, even deadly force, in certain situations. Even if Sampson's killing of Patillo was wrongful, Plaintiff has yet another hurdle to surmount, because not all wrongful acts of state employees rise to the level of violations of section 1983. *See* *Estelle v. Gamble*, 429 U.S. 97, 106 (1977); *Paul v. Davis*, 424 U.S. 693, 698-99 (1976). The issue facing the Court is whether the force employed by the officers was so excessive as to give rise to a section 1983 cause of action.

In this Circuit, a court must consider several factors in deciding whether the force is so excessive as to create section 1983 liability. The Court must balance the need for the application of force, the need for the degree of force applied, the extent of the injuries caused, and whether the force was applied in a good faith effort to control the victim or maliciously and sadistically for the purpose of causing injury. Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980), cert. denied, 451 U.S. 1019 (1981), quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom. John v. Johnson, 414 U.S. 1033 (1973).

Plaintiff suggests that the officers used excessive force on two separate occasions during their encounter with Patillo. First, they unnecessarily struck him while walking him across the parking lot. Second, Sampson unnecessarily shot and

killed him in the parking lot. The Court will consider each of these uses of force in turn.

Patillo did attempt to flee, and was struggling as the officers escorted him from his apartment to Craig's patrol car. Thus the officers needed to apply some force to control him. The Court has found, however, that both officers were not merely holding on to Patillo's struggling arms, as they testified, but were striking Patillo with little or no provocation by the time they reached the back of the patrol car. Thus, they applied more force than was necessary to control Patillo. The Court also concludes that these blows were not delivered in a good faith effort to control Patillo, but rather out of irritation at his initial resistance to their efforts to question him. After balancing the Williams factors, the Court concludes that Sampson and Craig employed force so excessive as to give rise to section 1983 liability while escorting Patillo toward Craig's patrol car.

With regard to Sampson's shooting of Patillo, the second and third factors of the Williams test support Plaintiff's arguments, and they weigh quite heavily in her favor. The injury to Patillo, of course, was the ultimate possible injury. The degree of force applied, furthermore, far exceeded the force required under the circumstances. Two officers were dealing with one smaller, intoxicated individual. Any fears that Patillo was armed were unreasonable because the complainant's statement that Patillo had returned his gun to his trunk, and were caused by the officer's own failure to frisk Patillo. The officers had successfully maneuvered a struggling Patillo down the street and

across the parking lot, and they were on the verge of placing him into a patrol car. Under these circumstances, non-deadly force should have been sufficient to control Patillo. The officers, of course, had deprived themselves of one effective option by leaving their nightsticks in their patrol cars. However, this negligence cannot excuse their use of excessive force. After balancing the Williams factors, the Court again concludes that the force employed, this time by Sampson alone, was so excessive as to create section 1983 liability.

The officers have raised the defense of good faith immunity. A state official is protected from liability for acts he performs in good faith in the pursuit of his duties. Wood v. Strickland, 420 U.S. 308 (1975); Scheurer v. Rhodes, 416 U.S. 232, 240 (1974). This qualified immunity is available to police officers. Pierson v. Ray, 386 U.S. 547, 555 (1967); Barker v. Norman, 651 F.2d 1107, 1120 (5th Cir. 1981). The officers have the burden of pleading this defense, Gomez v. Toledo, 446 U.S. 635 (1980), and the Court finds that the substance of this defense was raised in their Answer. See Answer at Fourth Defense. There is no doubt that the officers were acting in their official capacities at the time of their encounter with Patillo. Furthermore, the Court concludes that the actions they took were within their discretionary authority as police officers. Plaintiff can still prevail, however, by establishing that the officers were not acting in good faith during their encounter with Patillo. Barker, 651 F.2d at 1121; Cruz v. Beto, 603 F.2d 1178, 1182-83 (5th Cir. 1979).

"Good faith" has an objective and a subjective component. Wood, 420 U.S. at 321; Barker, 651 F.2d at 1121. If the officers lacked either subjective or objective good faith, they cannot raise the defense of immunity. Wood, 420 U.S. at 321. The objective component concerns the reasonableness of their actions in light of clearly established law at the time of the events at issue. The objective component concerns the presence or absence of malicious intent on their part. Id. Plaintiff has suggested that both components of good faith are lacking here.

With regard to the officers' striking of Patillo as they walked him to the car, the Court agrees. A violation of clearly established state law would deprive Sampson and Craig of the objective component of the good faith immunity defense. Williams v. Treen, 671 F.2d 892 (5th Cir. 1982). Under

Georgia law, police officers are immune from criminal prosecution for actions taken in making a lawful arrest only if those actions are "reasonable." Ga. Code Ann. § 26-901(d). There is no "reasonable" explanation of the actions of the officers. The Court has already found that the officers did not need to strike Patillo as they walked him toward the police car. He was, after all, a smaller, intoxicated older man, and they had a considerable weight advantage over him. They had been able to control him on the sidewalk simply by holding on to his arms. Their unprovoked striking of Patillo as they walked across the parking lot was not reasonably necessary to control him, and thus was not sufficient to insulate the officers from criminal liability under clearly established Georgia law. Certainly it cannot insulate them from civil liability, either.

Furthermore, even if the actions of the officers were objectively reasonable, the Court finds that Sampson and Craig lacked subjective good faith at this point in their encounter with Patillo. The Court bases this conclusion on the lack of independent evidence that this beating was provoked by Patillo and on its observation of the officers as they testified. Because they lacked both subjective and objective good faith, Craig and Sampson cannot assert the good faith immunity defense regarding their actions in striking Patillo.

The Court next turns to Sampson's assertion of good faith in his shooting of Patillo. When Sampson shot Patillo, he was attempting to protect himself as well as to question his victim. The Court accepts Sampson's testimony that he felt himself to be in some danger. Consequently, the Court cannot find that Sampson was not acting in subjective good faith when he shot Patillo. However, Plaintiff further suggests that Sampson's actions in shooting Patillo were not objectively reasonable in light of the clearly established law of Georgia.

Under Georgia law, the use of deadly force is justified only if a person "reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person, or the commission of a forcible felony." Ga. Code Ann. § 26-902(a). Plaintiff contends that even if Sampson subjectively believed his life to be in danger when he shot Patillo, this belief was not "reasonable," and hence his shooting of Patillo was not justified by existing law. This is a close question. It is true that at the moment Sampson shot him, Patillo was free and moving toward Sampson. Although the officers had not frisked him, Sampson had been told by the complainant that Patillo had returned his weapon to his trunk; thus, Sampson had no reason to think that Patillo was armed. Two younger, larger officers trained in the use of non-deadly force had other options at this point. With some hesitation, the Court concludes that Sampson's belief that his life was in danger was not "reasonable." Consequently, he was not acting in objective good faith when he shot and killed Patillo. Sampson therefore is not protected from section 1983 liability for Patillo's death by the qualified immunity defense.

B. Supervisor Defendants

Three of the remaining Defendants were high-level city or police officials on January 1, 1980. Jackson was Atlanta's Mayor, Brown was its Public Safety Commissioner, and Napper was its Chief of Police.

Plaintiff alleges that these Defendants, too, are liable under section 1983.

To establish the section 1983 liability of supervisors, Plaintiff must prove an "affirmative link" between Patillo's death and "the adoption of any plan or policy by [the supervisors]--express or otherwise--showing their authorization or approval of such misconduct." *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Plaintiff tempted to do so by attacking the Atlanta Police Department's procedures for selecting and training candidates for the force, the Department's failure to issue regulations clearly requiring its officers to carry nightsticks at all times, and its inadequate procedures for responding to calls for police assistance.

Plaintiff concedes that she named Jackson as a Defendant merely because he appointed Brown and Napper. Plaintiff's

Proposed Findings of Fact and Conclusions of Law at 9. Plaintiff presented no evidence regarding any further connection of Jackson to the events at issue here. The Court finds as a matter of law that Jackson is not liable under section 1983. *Cf*. *Monell v. Department of Social Service*, 436 U.S. 658 (1978) (liability of a government entity cannot be based solely on respondeat superior theory).

Napper and Brown are Defendants because they are responsible for hiring and training Craig and Sampson. Plaintiff's Proposed Findings of Fact and Conclusions of Law at 9. Plaintiff presented no evidence of any direct participation by Brown and Napper in the shooting of Patillo. *Cf*. *Baskin v. Parker*, 602 F.2d 1205, 1208 (5th Cir. 1979) (although sheriff cannot be held liable under section 1983 theory of respondeat superior, he might be liable for personal participation in actions of his deputies that violated plaintiff's constitutional rights). Although Brown and Napper do have the right to control the actions of Craig and Sampson, supervisors cannot be held liable under section 1983 for "mere right to control without any control or direction being exercised." Monell, 436 U.S. at 694 n.58, citing Rizzo, 423 U.S. at 370-71. The "affirmative link" between Patillo's death and the actions of Brown and Napper must therefore concern their failure to implement an adequate training program. However, Plaintiff presented no evidence that Brown and Napper had any connection with the selection and training of Atlanta police officers, other than their "mere right to control" such activities. In the absence of a more direct "affirmative link" between the death of Patillo and any

actions or inactions taken by Brown and Napper, the Court concludes that these Defendants, too, cannot be held liable under section 1983.

C. Municipal Liability

Plaintiff also asserts that the City of Atlanta is liable under section 1983 for Patillo's death. Theoretically, it is possible for the City to be held liable under section 1983 despite the fact that the individual supervisory defendants have escaped liability. The fact that Plaintiff has failed to establish an "affirmative link" between Patillo's death and the actions of the supervisors she chose to name as Defendants could merely indicate that Plaintiff named the wrong supervisors as Defendants. It does not necessarily follow that no police supervisor could be held liable under section 1983; if other known supervisors improperly selected and trained Sampson and Craig, the City might still be held liable for their actions.

The starting point for an analysis of municipal liability under section 1983 is the Supreme Court's decision in Monell v. Department of Social Services, 436 U.S. 658 (1978). In Monell, the Supreme Court held for the first time that municipalities were "persons" within the meaning of section 1983, and thus could be held liable under that statute. Id. at 690. However, the Court went on to hold that a municipality could not be held liable for all torts committed by its employees, but only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 694.

Plaintiff here asserts that two City "policies or customs" resulted in Patillo's death. Plaintiff asserts that it was the policy or custom of the Atlanta Police Department to inadequately select and train its officers and to fail to clearly require them to carry their nightsticks at all times. Plaintiff also asserts that it was the policy or custom of Atlanta police officers to use excessive force in their contacts with Atlanta citizens. The Court will consider these claims in reverse order.

It is possible to establish section 1983 liability against a municipality for police misconduct by proving that police regularly engage in a certain form of misconduct and that their supervisors do nothing about it. To make out such a case, however, plaintiffs generally present evidence of several similar incidents and a subsequent failure to discipline. See, e.g., Ellis v. City of Chicago, 478 F.Supp.

333 (N.D. Ill. 1979) (four incidents of police misconduct warrant denial of city's motion to dismiss); Knight v. Carlson, 478 F.Supp. 55, 59 (E.D. Cal. 1979) (municipal liability could be established by proof that use of excessive force by police is "the deeply imbedded traditional way of carrying out county policy" or "the regular and repeated response to a situation"). Cf. Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir.), cert. denied sub nom. Turpin v. City of West Haven, 449 U.S. 1916 (1980) (a single failure to discipline a police officer for an unlawful arrest is insufficient to establish municipal "custom or policy"). Plaintiff here presented very little evidence of other incidents in which Atlanta police officers used excessive force. Plaintiff merely cross-examined Sampson with respect to one incident that occurred after Patillo's death, and introduced reports indicating that citizens had complained of his conduct on two other occasions but he had been cleared. It is true that one court has held that allegations regarding a single incident of misconduct can sufficiently suggest that such misconduct is the policy or custom of a police force, at least so as to survive a motion to dismiss. Owens v. Haas, 601 F.2d 1242 (2d Cir.), cert. denied sub nom. County of Nassau v. Owens, 444 U.S. 980 (1980). However, Owens involved a particularly brutal, premeditated beating, and the active participation of relatively senior officials; neither factor is present in this case. The Court concludes that Plaintiff has failed to present sufficient proof that it was the policy or custom of Atlanta police officers to use excessive force; therefore, the City cannot be held liable on this theory.

Plaintiff's second theory of municipal liability concerns the alleged failure of the Atlanta Police Department to adequately select and train its officers, and its alleged failure to clearly require officers to carry their nightsticks at all times. Plaintiff alleges a wide range of inadequacies in these areas, but the Court needs to consider only one. Sampson was a police officer for less than five years before his resignation in 1978. After almost a year away from the Department, Sampson sought to return. The Department had indications that he might not be a model officer; in fact, the Department had "suspended" him during his absence for drug use while he was an officer. Despite these indications, and despite the fact that Sampson failed his first polygraph test concerning his drug use, the Department did not give Sampson any psychological testing when he

sought to return, even though new recruits such as Craig were receiving such testing during this period. Despite the length of his absence from the police force and his relative inexperience at the time he left, Sampson's retraining was accomplished in only one day, a day of "reorientation," according to Sampson. This failure to adequately test Sampson and to adequately prepare him for his return to duty constitutes negligence, at the very least.

Nor is there any doubt in the Court's mind that the City's failure to retrain Sampson played a role in the death of Patillo. Sampson testified that he did not recall the substance of his academy training regarding investigatory stops and regarding when to carry and use his nightstick. He testified that he did not recall ever being taught any method of dealing with a suspect armed with a gun that did not involve the use of his own weapon. Sampson could not intelligently discuss the legal requirements or the preferred methods of making an arrest, and was not quite sure when, if ever, he and Craig had placed Patillo "under arrest." These lapses of memory or knowledge on the part of Sampson, while regrettable and in this case disastrous, are understandable in the light of the Department's negligent omission of any serious attempt to retrain him upon his return to the Department--or at any other time. This negligence contributed directly to his shooting of Patillo.

It did not contribute, however, to the unprovoked striking of Patillo by the officers. That constitutional violation involved Craig as well as Sampson, and resulted more from the officers' emotional reaction to Patillo's attempted flight than from any lack of training. It is possible

that psychological testing upon Sampson's rejoining the force might have prevented that constitutional violation as well, but the Court is not prepared to so find on the evidence before it. The City's liability, if any, is limited to damages resulting from Sampson's violation of Patillo's rights in shooting him.

The City cannot be held liable in a section 1983 action for mere negligence, however. The leading case in this area is *Leite v. City of Providence*, 463 F.Supp. 585 (D.R.I. 1978). *Leite* held that municipal liability for inadequate training or supervision of its police force could be predicated only on a showing that the training was so inadequate that it amounted to "deliberate indifference" on the part of the municipality to the resulting violations of constitutional rights of its citizens. *Id*. at 590. The *Leite* court went on to say that training in a "reckless or grossly negligent manner so that future police misconduct is almost inevitable" would indicate the required "deliberate indifference." Id. Building on Leite, another district court has required proof that the municipality "completely failed to train" its officers or trained them with "reckless disregard of the need to inform and instruct police officers to perform their duties in conformance with the constitution." Edmonds v. Dillin, 485 F.Supp. 722, 727 (N.D. Ohio 1980). See also Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.), cert. denied sub nom. County of Nassau v. Owens, 444 U.S. 980 (1979); Spriggs v. City of Chicago, 523 F.Supp. 138, 142 (N.D. Ill. 1981); Popow v. City of Margate, 476 F.Supp. 1237, 1247 (D.N.J. 1979).

Atlanta has not "completely failed to train" its officers; for all practical purposes, however, it certainly failed to retrain Sampson upon his return to the Department. Combined with the Department's failure to administer any psychological tests to Sampson upon his return to duty, its failure to retrain him constitutes gross negligence. It should have been obvious that Sampson's return to duty without any serious retraining might result in violations of the constitutional rights of Atlanta's citizens. The Department's conduct amounts to a deliberate indifference to those constitutional violations. Thus, the City of Atlanta is liable for Sampson's shooting of Patillo.

2. Damages for Violations of Section 1983

One of the purposes of section 1983 is to provide compensation to citizens wronged by the deprivation of their constitutional rights. Carey v. Piphus, 435 U.S. 247, 254 (1978). A plaintiff is entitled to recover for the deprivation of the right itself, and for other injuries that are the natural consequence of the deprivation. See Whirl v. Kern, 407 F.2d 781, 797 (5th Cir.), cert. denied, 396 U.S. 901 (1969).

Thomas Patillo did not bring this lawsuit, of course; Plaintiff here is the administratrix of his estate, and a representative of his next of kin, his brothers and sisters. A question arises, therefore, as to whether either Patillo's estate or his next of kin are entitled to compensation in a section 1983 lawsuit for the injury suffered by Patillo. On its face, section 1983 does not answer this question. Because section 1983 is "deficient" in this respect, 42 U.S.C. § 1988 requires the Court to apply "the common law, as modified

and changed by the constitution and statutes of the [forum] State...so far as the same is not inconsistent with the Constitution and laws of the United States." The Supreme Court has read section 1988 to require the adoption of state law as "the principal reference point in determining survival of civil rights actions." Robertson v. Wegmann, 436 U.S. 584, 589-90 (1978). The Court must apply state law, in fact, unless it is inconsistent with the policies underlying section 1983. Id. The Supreme Court has also suggested that state tort law is useful in determining section 1983 damages. Carey, 435 U.S. at 257-58.

Under Georgia law, a tort claim is not extinguished by the the death of the injured party, but survives to his personal representative, in this case his administratrix. Ga. Code Ann. § 3-505. Georgia law further provides for a cause of action for "the homicide of the husband or parent"; such an action may be brought only by "a widow, or, if no widow, a child or children" of the deceased individual. Ga. Code Ann. § 105-1302. Federal courts, following the suggestions set forth in Robertson and Carey regarding the utilization of state law, have used these statutes in determining the survival of and the proper plaintiff in section 1983 suits arising from killings by police officers in Georgia. See Brazier v. Cherry, 293 F.2d 401 (5th Cir.), cert. denied, 368 U.S. 921 (1961); Anderson v. Jones, 508 F.Supp. 399 (N.D. Ga. 1980).

In Anderson, Judge Vining reasoned that section 3-505 applies to the survival of the decedent's cause of action for violation of his civil rights, while section 105-1302 creates a wrongful death

cause of action for his surviving spouse and children for their loss as a result of his death. 508 F.Supp. at 400. Under section 3-505, therefore, Patillo's causes of action for the two deprivations of his constitutional rights by Sampson, Craig and the City of Atlanta survive his death, and can be pursued by Plaintiff as his administratrix. If Patillo had been survived by a wife or child, those persons would also be entitled to damages for his wrongful death under section 105-1302, and they could pursue those damages as a remedy in the section 1983 action as well. See Brazier, 293 F.2d at 409. Patillo, however, left neither widow nor child, and his brothers and sisters are not given a wrongful death cause of action by section 105-1302. Therefore, the application of Georgia law, incorporated into section 1988, would appear to limit Plaintiff's recovery here to damages for violation of Patillo's constitutional rights, to which Patillo's estate is entitled, while foreclosing the collection of damages for his wrongful death, which are not available to his brothers and sisters.

The Court would be permitted to disregard state law, according to section 1988, if it were "inconsistent with the Constitution and laws of the United States." The Supreme Court has provided some guidance in this area in *Robertson v. Wegmann*, 436 U.S. 584 (1978). *Robertson* was a section 1983 suit seeking damages for bad faith prosecutions. The plaintiff died before trial, and the defendants moved to dismiss, pointing out that under Louisiana law the analogous tort action would survive only in favor of a spouse, children, parents or siblings; the deceased plaintiff had no such relations. The District Court

denied the motion to dismiss, finding the Louisiana abatement law to be "inconsistent with" federal law within the meaning of section 1988, and creating a federal common law of survival of all section 1983 actions. *Id.* at 587. The Fifth Circuit agreed, finding the abatement of the remedy to be inconsistent th the broad remedial purposes of section 1983. *Id.* at 588. The Supreme Court, however, reversed, finding that abatement was not inconsistent with federal law. *Id.* at 592-93.

The *Robertson* court carefully limited its holding, *id.* at 594, and expressly left open the question presented by this case, that is, "whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused the death." *Id.* The *Robertson* reasoning nonetheless can provide a pattern for this Court's analysis of the possible "inconsistency" of Ga. Code Ann. § 105-1302 with federal civil rights law.

The Robertson court began by considering the policies underlying section 1983, the "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." Id. at 591. The abatement statute did not impair the deterrent function, the Court held, because relatively few plaintiffs would not be survived by a spouse, child, parent or sibling. Id. at 591-92. As for the compensation function, it would not be served by forcing the defendant to pay damages to the decedent's estate. Id. at 592. Therefore the Court held the abatement statute to be not inconsistent with the policies expressed in section 1983.

This analysis mandates the same conclusion with regard to Ga. Code Ann. §

105-1302. It is true that section 105-1302 is more restrictive than the Robertson statute, because it does not provide a cause of action for parents or siblings. Although it is a closer question here, the Court believes that the probability that a state official's victim might have a spouse or child, who could collect damages under section 1983 for a wrongful death, should provide sufficient deterrent to state misconduct that results in the death of citizen. Nor would the compensation function of section 1983 be served by overriding section 105-1302 and permitting Patillo's next of kin to collect the full value of his life; although there was some evidence that Patillo occasionally did handyman work around the homes of some of his siblings, he was not contributing to the support of any of them at the time of his death, and thus they lost nothing, financially, when he died. The Court concludes that Plaintiff's damages are limited to compensation for the violation of Patillo's constitutional rights, to which Patillo's estate is entitled under section 1983 and Ga. Code Ann. § 3-505.

Plaintiff's proof on the damages issue was sparse, and exclusively directed toward the wrongful death aspect of the section 1983 claim. The proof consisted of evidence regarding Patillo's life expectancy and income, and bills for the expenses of his funeral. These are items of damages that might properly be claimed by a surviving wife or child under Ga. Code Ann. § 105-1302, but they are are not damages for violations to Patillo's constitutional rights and thus cannot be awarded here.

Nonetheless, Sampson, Craig and the City of Atlanta deprived Patillo of his constitutional rights. Violation of those

rights cannot go unpunished by the serendipitous fact that the victim happened to die a bachelor with no children. Certain other harms necessarily accompanied the violation of Patillo's constitutional rights, and his estate is entitled to general damages for those harms. Such harms include any injuries resulting from the officers' unprovoked striking of Patillo, his emotional distress, and the humiliation he suffered during his encounter with the police officers. The Court is aware that *Carey v. Piphus*, 435 U.S. 247 (1978), forecloses the award of damages for mental and emotional distress caused by the denial of a right to a hearing unless such damages are actually proved. However, the *Carey* court limited the effect of that opinion to procedural due process claims under section 1983, *see id*. at 264-65, and refused to disapprove section 1983 awards of damages "inferred from the circumstances" for other constitutional violations. *Id*. at 264 n.22, quoting *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 579 (7th Cir. 1975), *cert*. *denied*, 425 U.S. 963 (1976). The Court does not believe that *Carey* forecloses an award of more than nominal damages for the humiliation and emotional distress caused to Patillo by Sampson, Craig and the City of Atlanta. The Court concludes that $1,000 would be adequate compensation for the deprivation of Patillo's rights by Sampson and Craig when they struck him unnecessarily, and that $20,000 would be adequate compensation for the deprivation of his rights by Sampson and the City of Atlanta when Sampson shot him. The Court awards those sums as general damages to Plaintiff as Patillo's administratrix.

Plaintiff also seeks punitive damages. Such an award is permissible under section 1983. *See* *Carey*, 435 U.S. at 257 n.11. An important factor in deciding on whether to award punitive damages, of course, is the nature of the defendant's conduct. *See*, *e.g.*, *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). The Supreme Court has suggested that a trial court's conclusion regarding a defendant's subjective good faith is also relevant to the awarding of punitive damages. *Wood*, 420 U.S. at 322. In light of the Court's finding that Sampson acted in subjective good faith when he shot Patillo, the Court declines to award punitive damages against him for that violation. Nor can punitive damages be assessed against the City of Atlanta for its violation of Patillo's rights in failing to restrain Sampson properly. City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981).

With regard to the unprovoked striking of Patillo by Sampson and Craig, however, the Court did not find subjective good faith on the part of the officers. It is not uncommon for a court to award punitive damages in a civil rights action arising from the use of excessive force to deter police officers from future abuses of their authority. See, e.g., Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975), cert. dismissed, 429 U.S. 118 (1976); Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975). The Court believes that punitive damages are justified for the officers' striking of Patillo, and awards $4,000 in punitive damages jointly against Craig and Sampson for this violation.

Plaintiff filed a post-trial motion to amend her Complaint under Fed.R.Civ.P.

15(b) to conform it to the evidence. As amended, the Complaint would seek certain additional equitable relief. Plaintiff would like the Court to order an internal police investigation of the incident and internal disciplining of Sampson and Craig, psychological testing of the officers, the revision of police academy training regarding the use of deadly and non-deadly force, and the implementation of a retraining program. These requests open substantial new questions of law and fact. Furthermore, the evidence before the Court does not provide a sufficient basis to justify the relief sought by Plaintiff. The Court therefore DENIES Plaintiff's post-trial motion to amend.

Finally, Plaintiff seeks attorney's fees pursuant to 42 U.S.C. § 1988. The Court GRANTS this award, and directs Plaintiff to file all affidavits and briefs regarding the amount of such an award within 30 days of the date of entry of this Order.

3. State Law Claims

Plaintiff also seeks damages for several state law torts, under the Court's pendent jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). These torts include false arrest, false imprisonment, and assault and battery.

Georgia law creates a cause of action for an arrest "without probable cause, when made maliciously." Ga. Code Ann. § 15-1001. Plaintiff has not established a lack of probable cause. The officers did have probable cause to arrest Patillo, within the meaning of Ga. Code Ann. § 105-1003 ("want of probable cause...shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to

injure the accused"). The driver of the red van had reported to the officers that a person had threatened him with a gun; such a threat might constitute aggravated assault, a felony under Georgia law. See Ga. Code Ann. § 26-1302. The complainant had subsequently identified Patillo as the man who had threatened him. Patillo then took the first opportunity to attempt to flee. These factors add up to probable cause. The Court finds for all Defendants on the false arrest claim.

False imprisonment, under Georgia law, "consists in the unlawful detention of the person of another." Ga. Code Ann. § 105-901. Because the officers had probable cause under Ga. Code Ann. § 105-1003 to detain Patillo, the detention was not unlawful. The Court therefore finds for all Defendants on the false imprisonment claim.

Assault and battery presents a different problem. Georgia law provides that for causes of action for "a physical injury done to another...whatever may be the intention of the actor, unless he shall be justified under some rule of law," Ga. Code Ann. § 105-601, and for "any violent injury or attempt to commit a physical injury illegally upon a person." Ga. Code Ann. § 105-602. Damages for these torts, however, would necessarily be in the nature of compensation for emotional distress and humiliation, because neither Patillo's estate nor his siblings can collect damages for his wrongful death. See discussion above. The Court has already awarded such damages for the violation of Patillo's constitutional rights. The Court is not permitted to award double compensation for the same injuries on separate theories of assault and battery and violation of

section 83. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). Therefore, the Court will not make a further award to Plaintiff even though Plaintiff apparently is entitled to recovery under Ga. Code Ann. §§ 105-601 and 105-602.

CONCLUSION

The Court DENIES all motions for directed verdict, and DENIES Plaintiff's post-trial motion to amend. On the basis of the foregoing analysis, the Court finds for Plaintiff and against Defendants Craig and Sampson, and AWARDS $1,000 in general damages and $4,000 in punitive damages against these Defendants. The Court finds for Plaintiff and against Defendants Sampson and the City of Atlanta and AWARDS $20,000 in general damages against these Defendants. The Court also AWARDS Plaintiff the costs of her action, against Defendants Craig, Sampson and the City of

Atlanta, and also AWARDS Plaintiff attorney's fees against these three Defendants in an amount yet to be determined. The Court finds for Defendants Jackson, Brown and Napper and against Plaintiff.

SO ORDERED, this 21st day of June, 1982.

S/ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA F. GILMERE, Individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin,

Plaintiff,

v.

CITY OF ATLANTA, GEORGIA, et al.,

Defendants.

CIVIL ACTION NO. C80-181

ORDER

This civil rights action arose from the death of Thomas Patillo, who was shot and killed on January 1, 1980 by Defendant R. C. Sampson, an Atlanta Police Officer. Plaintiff Gilmere, Patillo's sister and executrix, brought this action under 42 U.S.C. § 1983, alleging that Defendants had deprived Patillo of several constitutional rights. Among the Defendants were Sampson, his fellow officer C. C. Craig, and the City of Atlanta. On June 21, 1982, the Court issued findings of fact and conclusions of law. The Court found two separate violations of Patillo's constitutional rights; Craig and Sampson had struck Patillo without provocation, and Sampson had unjustifiably shot and killed Patillo. For the first of these violations, the Court awarded compensatory damages of $1,000 and punitive damages of $4,000 against Sampson and Craig. For the second violation, the Court awarded compensatory damages of $20,000 against Sampson and the City of Atlanta.

Plaintiff has now moved to alter or amend the judgment to increase the amount of damages awarded against Sampson and the City of Atlanta for the killing of Patillo. The Clerk has not entered judgment, because the amount of the attorney's fees to be

awarded to Plaintiff has yet to be determined; the Court will therefore treat Plaintiff's motion as a motion to amend its conclusions of law.

Plaintiff contends that the proper measure of damages under section 1983 for Sampson's killing of Patillo is the full value of Patillo's life. In its conclusions of law, the Court rejected this argument. Because Patillo's next of kin were his brothers and sisters, the Court held that his death created no state law wrongful death action. Noting that 42 U.S.C. § 1988 required the Court to employ state law as "the principal reference point in determining the survival of civil rights actions," Robertson v. Wegmann, 436 U.S. 584, 589-90 (1978), the Court held that there could be no recovery for wrongful death damages in this action.

In holding that Patillo's death would create no action for wrongful death because he left neither widow nor child, the Court relied on Ga. Code Ann. § 105-1302. That statute creates an action for wrongful death, but specifies that it must be brought by the decedent's widow or child. The Court was not aware that this limitation on the cause of action had effectively been removed by Ga. Code Ann. § 105-1309. Section 105-1309 provides:

> In cases where there is no person entitled to sue under the foregoing provisions of this Chapter [including section 105-1302]...the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any such case the amount of the recovery shall be the full value of the life of the decedent.

Therefore Plaintiff, as Patillo's administratrix, could have sued for Patillo's wrongful death, and held any recovery for the benefit of Patillo's next of kin. As

the Court stated in its June 21 Order, Robertson requires the Court to base its decision as to the survival of her section 1983 cause of action on state law; thus the Court erred in relying on section 105-1302.

It does not necessarily follow that the Court must employ state law regarding the amount of damages, however. The Supreme Court has considered the question of the measure of damages under section 1983 only once, in Carey v. Piphus, 435 U.S. 247 (1978). In Carey, the Court stated that state tort law "provide[s] the appropriate starting point" for the inquiry into the proper measure of damages under section 1983. Id. at 258. The Court then noted that "tort rules of damages will [not] provide a complete solution to the damages issue in every case." Id. Tort law will not be helpful, for instance, if there is no tort law analogue for the constitutional violation. *Id*. In this case, however, there is a tort law analogue, in the wrongful death action under Ga. Code Ann. §§ 105-1302 and 105-1309; those laws provide for "the full value of the life of the decedent" as the measure of damages. Where such an analogue exists, the *Carey* Court Stated, "it *may* be appropriate to apply the tort rules of damages directly to the § 1983 action." 435 U.S. at 258 (emphasis added). In *Carey*, then, the Court was quite careful not to *require* the incorporation of state law torts damages rules into suits under section 1983, as it had required the adoption of state law regarding the abatement of torts actions in *Robertson*. Indeed, *Carey* has generally been read as inviting the federal courts to adopt a federal common law of damages in section 1983 actions, based on state tort law

theory but not entirely dependent on it. See *Robertson*, 436 U.S. at 597 (Blackmun, J., dissenting); Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 Calif.L.Rev. 1242, 1244 n.12 (1977); Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 Harv.L.Rev. 967, 986 (1980); *see also* *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40 (1969) (holding that compensatory damages for deprivation of a federal right under 42 U.S.C. § 1982 "are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988"). The Court does not believe that it is *required* to award the full value of Patillo's life to his estate, then; that measure of damages merely provides "the starting point."

The *Carey* Court held that "the compensation principle" should determine the measure of damages under section 1983. 435 U.S. at 255-56. As the Court noted in its June 21 Order, Patillo's next of kin did not depend on him for financial support. Thus an award of the full value of Patillo's life would over-compensate them for their financial loss. Therefore it is proper for the Court to award some lesser amount. The Court has not changed its opinion that $20,000 would adequately compensate Patillo's estate for the civil rights violation he suffered at the hands of Sampson.

Plaintiff suggests that she is entitled to damages in the amount of the full value of Patillo's life on a different theory, however. She contends that her Complaint set forth a pendent state law cause of action for wrongful death, and that she established Defendants' liability

at trial for wrongful death as well as for civil rights violations.

Plaintiff did not plead a cause of action for wrongful death in her Complaint. In relevant part, the only paragraph on which she relies alleges

> That as a direct and approximate [sic] result of all of the above THOMAS E. PATILLO met his untimely death and was therefore deprived of his rights, privileges and immunities guaranteed him under the Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States, Title 42 U.S.C. 1983 and 1988, to remain free from unlawful death, intrusions upon his property and person, physical abuse, cruel and unusual punishment and deprivations of his life and liberty without due process of the law.

Complaint at ¶ 23. The next paragraph, on which Plaintiff does not rely, states "that the defendant's [sic] actions are the proximate cause of the death of THOMAS E. PATILLO and the Plaintiff is entitled to recover the full value of his life." Id. ¶

24. These two paragraphs are part of Plaintiff's "First Cause of Action." It is clear that in this "cause of action" Plaintiff attempted somewhat inartfully to set forth a claim under section 1983 for violations of Patillo's constitutional rights. Plaintiff did not plead a wrongful death claim in the "cause of action;" she merely mentioned Patillo's death as a violation of his civil rights and as suggesting a possible measure of damages. The Complaint also contains a "Second Cause of Action" specifically stating a state law claim for assault and battery, and a "Third Cause of Action" specifically stating a state law claim for false imprisonment, and the Court later permitted Plaintiff to amend her Complaint to include a state law claim for false arrest. See Order entered August 4, 1981. Had she so desired, Plaintiff could easily have pleaded a specific

state law claim for wrongful death; she did not.

Plaintiff contends, however, that a wrongful death claim was presented and tried at trial, and Defendants failed to object to the admission of evidence relevant to this claim. Consequently they impliedly acquiesced in Plaintiff's maintenance of a wrongful death action, Plaintiff asserts, and she is entitled to amend her Complaint to allege such a cause of action and to collect wrongful death damages. In support, Plaintiff cites Fed.R.Civ.P. 15(b), which provides, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respect as if they had been raised in the pleadings."

Plaintiff's argument is premised on Defendants' "implied consent" to the trial of the wrongful death claim. Such consent is routinely implied where a party has failed to object to the admission of evidence that is clearly relevant to an issue not pleaded in the complaint. See, e.g., Metropolitan Life Insurance Co. v. Fugate, 313 F.2d 788 (5th Cir. 1963); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1493 (1971), and cases cited therein at 463 n.68. It is true that Plaintiff introduced evidence relevant to a wrongful death claim at trial, and Defendants did not object. However, such evidence was also relevant to Plaintiff's section 1983 claim. Plaintiff cannot rely on the introduction of evidence relevant to an issue already in the case to show Defendants' consent to the trial of a new issue absent a clear indication to Defendants that Plaintiff was attempting to raise this issue. International Harvester Credit Corp. v. East Coast Truck and R.V.

Sales, Inc., 547 F.2d 888, 890 (5th Cir. 1977); Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857, 861 (5th Cir. 1966); cases cited in C. Wright & A. Miller, supra, at 466 n.71. There was no such clear indication in this case.

If there had been, then Defendants might well have presented additional defenses. Defendants may have chosen to present evidence and to argue Patillo's comparative or contributory negligence, for example, in getting drunk and then attempting to flee from Sampson and Craig. These defenses are irrelevant to a section 1983 claim, but could have served to reduce or eliminate any recovery for wrongful death. Another defense that the City of Atlanta might have raised is municipal immunity. Ga. Code Ann. § 69-307 provides: "A municipal corporation shall not be liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law." This immunity applies to intentional torts as well as negligent acts by police officers. Tucker v. Thompson, 421 F Supp. 297, 299 (M.D. Ga. 1976), and cases cited therein. Thus the City of Atlanta, one of the Defendants who Plaintiff contends impliedly consented to the trial of a wrongful death action, could not be held liable for Patillo's wrongful death.

Even under the liberal pleading rules established by the Federal Rules of Civil Procedure, Defendants are entitled to notice of the claims they must defend against. It would be inequitable to permit Plaintiff to add a wrongful death claim at trial without clear notice to Defendants, who must be given a fair opportunity to plan their defenses to meet this claim. Cook v. City of Price, 566 F.2d 699, 702

(10th Cir. 1977); 6 C. Wright & A. Miller, supra, at 467. Furthermore, the City of Atlanta could not be held liable on a wrongful death theory. For both these reasons, the Court therefore denies Plaintiff's belated request to add a wrongful death claim to her Complaint, and to collect damages for wrongful death.

On the basis of the foregoing analysis, the Court has determined that Plaintiff is not entitled to additional damages or for the violation of Patillo's constitutional rights, and that the Plaintiff did not bring and cannot now add a pendent state law wrongful death claim. The Court therefore DENIES Plaintiff's Motion to Alter or Amend.

SO ORDERED, this 6th day of August, 1982.

S/ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[737 F.2d 894]

EMMA F. Gilmere, individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of this next of kin, Plaintiff-Appellee, Cross-Appellant,

v.

CITY OF ATLANTA, GEORGIA, et al.,

Defendants-Appellants,
Cross-Appellees.

EMMA F. GILMERE, Plaintiff-Appellee, Cross-Appellant,

v.

CITY OF ATLANTA, et al., Defendants-Appellants, Cross-Appellees.

Nos. 82-8457, 82-8760

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

July 9, 1984

Appeals from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, and HILL, Circuit Judge and LYNNE*, District Judge.

TJOFLAT, Circuit Judge:

This is a survival action[1] brought by the administratrix of the estate of a man injured, and killed, in a police-citizen encounter. We determine the sufficiency of the plaintiff's damages claims under 42 U.S.C. § 1983 (1982),[2] and state tort law, against the City of Atlanta, three officials of the City's Police Department, and two uniformed police officers under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); and Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). We conclude on the basis of the district court's findings of fact and conclusions of law that the plaintiff failed to establish a 42 U.S.C. § 1983 (1982) claim against any of these defendants. We also conclude that plaintiff failed to establish state law claims of false arrest or false imprisonment against

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* Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1] See infra note 8.

[2] Section 1983 was originally enacted as part of the Civil Rights Act of 1871, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes," 17 Stat. 13 (1871), sometimes referred to as "the Ku Klux Klan Act," or the "Third Civil Rights Act." The current wording, essentially the same as the original, reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person

(footnote continued)

(footnote continued from previous page) within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

any defendant. The district court's finding and conclusions on plaintiff's state law claim against the individual defendants for assault and battery are inadequate to permit us to render a decision as to their sufficiency; consequently, we remand that claim for further proceedings.

I.

The plaintiff's claims in this case grew out of a New Year's Day celebration. We recite the salient facts as the district court found them.

Thomas Patillo, the plaintiff's decedent, spent the afternoon of January 1, 1980, driving about Atlanta with a male companion, visiting friends and drinking quite heavily.[3] He came home around 5:00

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[3] At the time of his death Patillo's blood alcohol content was .27 milligrams percent. A .10 milligrams percent level created a presumption of intoxication under (footnote continued)

p.m. and pulled into a service station across the street from his house to buy some gas. As he was driving out of the station he almost hit a red van also leaving the the station. Patillo and the driver of the van got out of their vehicles and exchanged words. Patillo pulled a handgun from his trunk and threatened the driver. The driver, in turn, ran for a telephone and called the police. Atlanta Police Officers C.C. Craig and R.C. Sampson responded to the call. By this time, Patillo had gone home and parked his car in front of his house. The two officers, accompanied by the driver of the van, walked to Patillo's front porch and knocked on the door. A friend of Patillo's answered the door, and Officer Sampson asked for the driver of the car parked out

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(footnote continued from previous page) Georgia law. O.C.Ga. § 40-6-392(b)(3) (1981).

front. Patillo then came to the door, and the driver of the red van said, "That's him, he's the one."[4] Patillo's friends began to gather about, and the officers decided to question Patillo away from his house.

Officer Sampson grabbed Patillo[5] to steady him as they walked down the porch steps; Patillo was quite drunk.[6] Upon reaching the sidewalk Patillo bolted. Sampson caught him and held him by the back of the belt while Officer Craig grabbed his arm. They decided to take him to their patrol car which was parked in an adjacent parking lot. One of Patillo's friends followed the officers, shouting and excoriating them; they warned him to stand back, and he withdrew. Once again Patillo tried to escape, flailing his arms at the officers. In the struggle that ensued, the officers struck Patillo about the head a number of times with their hands.[7]

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[4] The driver of the red van disappeared in the ensuing confusion and was never located by police.

[5] Patillo was a 38-year old black male approximately 5'9" tall, weighing 130 pounds. R.C. Sampson is a black male, approximately 5'9" tall, and weighed 150 pounds. C.C. Craig is a white male, approximately 5'8", and weighed about 250 pounds.

[6] See supra note 3.

The officers eventually got Patillo to their patrol car. It was parked parallel to a Chevrolet Camaro: the fronts of both cars were against a building. When Officers Craig and Sampson and Patillo entered the space between these two cars Patillo broke away and grabbed Craig's holstered revolver. The revolver became disloged and fell to the ground. Patillo lunged at Sampson, who, fearing the Patillo had the gun, reacted by pulling his revolver and firing two shots into Patillo's abdomen. Patillo collapsed and was declared dead thirty minutes later.

The shooting and the circumstances surrounding it were reviewed by the Internal Affairs Division and the Firearms Review Board of the Atlanta Police Department. Neither found any misconduct on the part of the officers. The Fulton County Grand Jury and the Federal Bureau of Investigation also reviewed the incident and recommended that no action be taken.

Plaintiff, as administratrix of Patillo's estate, then filed this suit against the City of Atlanta, its Mayor, Public Safety Director, and Chief of Police, and Officers Craig and Sampson. She sought to recover against these defendants, jointly and severally, the money damages her decedent, Patillo, allegedly would have been entitled to recover had he survived.[8] Her complaint set forth in separate counts, four discrete causes of action. Count one, the claim that gave the district court subject matter jurisdiction

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[7] They either struck him with their open palms or employed moderate force using their fists. There were no marks of any type upon Patillo's scalp, which was bald, face, or neck, however.

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[8] In *Brazier v. Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961), the Fifth Circuit acknowledged that the federal civil rights laws do not speak to survivorship of actions and the courts must, therefore, look to the laws of the states in which they sit to determine if provision is made for the survivorship of a given cause of action. It is undisputed that in Georgia the decedent's claim for damages sustained during his lifetime survives:

> No action for a tort shall abate by the death of either party, where the wrongdoer received any benefit from the tort complained of; nor shall any action, or cause of action, for the recovery of damages for homicide, injury to the person, or injury to property abate by the death of either party. The cause of action, in case of the death of the plaintiff and in the event there is no right of survivorship in any other person, shall survive to the personal representative of the deceased plaintiff ....

Ga. Code Ann. § 3-505 (1978).

Section 3-505 allows for the

(footnote continued)

of the case, was brought under 42 U.S.C. § 1983 (1982); plaintiff alleged that the defendants, acting under color of state law, had deprived Patillo of his life[9] and liberty without due process of law, in

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(footnote continued from previous page) survivorship of tort actions. It is distinct from, and should not be confused with, the Georgia wrongful death statute, which at the time of this suit was codified at Ga. Code Ann. § 105-1301 (1978). The Georgia wrongful death statute creates a new cause of action in certain individuals for the value of the decedent's life. We deal here solely with section 3-505, which permits survival of the tort claims which the deceased possessed the instant before he died. *Accord Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Anderson v. Jones*, 508 F.Supp. 399 (N.D. Ga. 1980).

As the Georgia Supreme Court put it, section 3-505 provided "for the survival to the administrator of causes of action that exist in the deceased person before his death." *Complete Auto Transit, Inc. v. Floyd*, 214 Ga. 232, 238, 104 S.E.2d 208, 213 (Ga. 1958) (husband's suit under wrongful death statute for death of wife not part of the same cause of action as his suit as administrator under § 3-505 for wife's pain and suffering and medical and funeral expenses). *See also Wrongful Death Actions in Georgia*, 19 Ga.B.J. 277 (1957).

The district court, here, treated plaintiff's claim as having been brought

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violation of the fourteenth amendment, and had subjected him to an unreasonable seizure and cruel and unusual punishment, in violation of the fourth, eighth and fourteenth amendments.[10] The City allegedly deprived Patillo of these rights by promulgating a policy that permitted the deployment of untrained police officers and the use of excessive force in police-citizen encounters; the Mayor, Public Safety Director and Chief of Police (the supervisors) were allegedly liable because they implemented this policy in a general way. Officers Craig and Sampson deprived Patillo of his rights by beating and shooting him.

Counts two, three, and four presented pendent state law claims.[11] Count two

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(footnote continued from previous page) under the Georgia survival statute and entered judgment for her on that theory. Thereafter, plaintiff objected in a motion to alter or amend judgment, claiming that her complaint also stated a claim for wrongful death. The district court found otherwise in a lengthy written order which we find persuasive and affirm.

Since the trial in this case Ga. Code Ann. § 3-505 (1978) has been recodified in its entirety as O.C.Ga. § 9-2-41 (1982).

[9] Notwithstanding this allegation, the district court correctly construed plaintiff's complaint as not claiming damages for the deprivation of Patillo's life but only for the deprivation of his liberty. See supra note 8. In this opinion, therefore, our discussion is limited to the defendants' alleged deprivation of Patillo's liberty interest.

[10] The fourth amendment prohibition of unreasonable seizure was made applicable to the states under the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The eighth amendment prohibition on cruel and unusual punishment was incorporated into the fourteenth amendment by Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). For ease of analysis, hereafter we refer to these guarantees simply as fourth and eighth amendment rights.

[11] Count four, the claim for false arrest, was added by amendment to the complaint.

sought money damages for assault and battery; count three for false imprisonment; count four for false arrest.

The defendants filed a joint answer to plaintiff's complaint. They denied the material allegations of the complaint and alleged, as affirmative defenses, that no count of the complaint stated a claim for relief and that they had at all times maintained a reasonable good faith belief in the legality of their actions.

The case was tried to the court. At the close of the plaintiff's case, the defendants moved for dismissal pursuant to Fed.R.Civ.P. 41(b). The court declined to render judgment until the close of all the evidence and therefore denied their motion. At the conclusion of the trial the court asked the parties to brief the question of whether Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), barred plaintiff's count one section 1983 claim against any of the defendants. The parties submitted their briefs, but, inexplicably, the court did not deal with the Parratt question in its dispositive findings of fact and conclusions of law.

In its dispositive order, the district court dealt with count one first. The court denied as meritless plaintiff's fourth and eighth amendment claims.[12] It upheld, however, plaintiff's section 1983 fourteenth amendment due process claim, concluding that the City and Officers Craig and Sampson had deprived Patillo of a protected liberty interest,[13] the right to be free from the infliction of unnecessary physical force against one's person in a police-citizen encounter. The court held that that one or more of these three defendants had deprived Patillo of this interest on two occasions: when he was struck about the head and when he was shot. The court concluded that Officers Craig and Sampson were the wrongdoers on the first occasion and held them liable for $1,000 in compensatory damages and $4,000 in punitive damages. The court held Sampson and the City liable for the shooting-Sampson because he performed the act, the City because it had trained him in a grossly negligent manner-and assessed $20,000 in compensatory damages against them. The court refused to assess punitive damages against either of these defendants because Sampson had acted in good faith, subjectively believing that Patillo had Craig's revolver in hand, and the City was immune from punitive damage liability under City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). The court found no liability upon the part of the supervisors for violating any of Patillo's federal constitutional rights because plaintiff failed to prove an

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[12] See supra note 10. The fourth amendment claim fell because, as the district court noted in discussing the state law false arrest and false imprisonment issues, the officers had probable cause to arrest Patillo under O.C.Ga. § 51-7-3, formerly Ga.Code Ann. § 105-1003 (1981); see infra text Slip op. at p. 4491, ____. The eighth amendment claim was without merit. Ingraham v. Wright, 430 U.S. 651, 659-71, 97 S.Ct. 1401, 1406-12, 51 L.Ed.2d 711 (1977).

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[13] "Liberty" and "property" interests protected by the fourteenth amendment are usually defined by state law. See, e.g., Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); see generally Nahmoud, Section 1983 and the "Background of Tort Liability", 50 Ind.L.J. 5 (1974). It is beyond peradventure that Georgia law protects individuals from bodily invasions such as assault and battery. See, e.g., infra text Slip op. at p. 4485, at ____. In Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), the Supreme Court defined "liberty" to include freedom from bodily restraint. See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law 416-22 (2d ed. 1983); Smolla, The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company, 1982 U.Ill.L.Rev. 831.

"affirmative link" between the supervisors' conduct and the constitutional injury, as required by Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

The district court disposed of plaintiff's state law claims summarily. The court denied her assault and battery claim on the theory that that claim was identical to, and duplicative of, her count one section 1983 due process claim. The court denied plaintiff's false imprisonment (count three) and false arrest (count four) claims because the officers had probable cause to arrest and detain Patillo. In a supplemental proceeding, the court awarded plaintiff $28,464.00 in attorney's fees pursuant to 42 U.S.C. § 1988 (1982).[14]

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[14] The court also awarded the plaintiff $8,606.40 in costs. Our disposition of this appeal requires us to set aside that award as against the City. Because the district court, on remand will enter judgment against the officers and, if they
(footnote continued)

The City and the officers appeal, contending that the plaintiff's section 1983 claim against them was insufficient as a matter of law. They ask that we render judgment in their favor. The plaintiff cross-appeals, contending that the court misapplied Rizzo v. Goode in concluding that there was no "affirmative link" between the supervisors' conduct and Patillo's constitutional injury, and that we should direct the district court, on remand, to enter liability and assess damages against the supervisors. The plaintiff also contend that the district court misapplied the law in assessing her attorney's fees and in disposing of her pendent state law claims against the super-

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are found liable, the supervisors, the court will have to redetermine the costs the plaintiff should recover.

visors and the officers.[15] She asks us to remand these issues to the district court for further consideration.[16]

For the reasons we set forth below, we conclude plaintiff failed to established a 42 U.S.C. § 1983 (1982) case (count one) against the City under the standard of Monell v. Department of Social Services; therefore, the City is entitled to judgment on count one of plaintiff's complaint. The plaintiff also failed to establish a section 1983 case against the officers or the supervisors. Her claim against the former was barred by Parratt v. Taylor, against the latter by Rizzo v. Goode. Accordingly,

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[15] We do not read plaintiff's notice of appeal and briefing to us as requesting review of the district court's holding that the City was not liable on the state law claims.

[16] Plaintiff also contends on cross-appeal that her complaint stated a claim for a wrongful death type recovery. Her contention is meritless. See supra notes 8 and 9 and accompanying text.

the district court's judgment on count one against the officers is reversed; with respect to the supervisors, the judgment in their favor is affirmed. Because of our disposition of plaintiff's section 1983 claims, she is not entitled to fees under 42 U.S.C. § 1988 (1982), and the court's award thereof is set aside. Plaintiff's count two state law claim against the officers and the supervisors for assault and battery is remanded to the district court for further proceedings. We affirm the district court's denial of relief on counts three and four, the state law claims for false imprisonment and false arrest.

We discuss the issues on appeal as follows: in part II, the City's liability under 42 U.S.C. § 1983 (1982); in parts II and IV, the officers' and supervisors' liability, respectively, under section 1983 and state tort law.

II.

Monell v. Department of Social Services holds that a municipality can be sued for damages under 42 U.S.C. § 1983 (1982) when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels." Monell, 436 U.S. at 690-91, 98 S.Ct. at 2035-36, rev'g in part Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Thus, Monell imposes liability on municipalities for deprivations of constitutional rights visited pursuant to municipal policy, whether that policy is officially promulgated or authorized by custom. The official policy or custom "must be 'the moving force of the constitutional violation' in order to establish liability of a government body under § 1983." Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981).[17] See Williams v. City of Valdosta, 689 F.2d 964, 969 (11th Cir. 1982), citing Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980); see also Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982).

Monell limits what may constitute "custom."[18] Custom consists of those practices of city officials that are "so permanent and well settled" as to have "the force of law."' Id. 436 U.S. at 691, 98 S.Ct. at 2036. In defining custom in this fashion the Monell Court borrowed language from Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970),[19] which defines the term "custom" as "persistent and widespread ... practices" or practices that are "permanent and well settled" or "deeply embedded traditional ways of carrying out ... policy."[20] Id. Accord, Bennett v. City of Slidell, 728 F.2d. 762 (5th Cir. 1984) (en banc). Monell additionally teaches that the custom which may serve as

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[17] Cf. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561, (1976) (general allegations of administrative negligence fails to state a constitutional claim cognizable under § 1983).

[18] See Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir.1980); Williams v. City of Valdosta, 689 F.2d 964, 969 (11th Cir. 1982).

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[19] For a thorough description of this area, see Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) (en banc).

[20] In Adickes a white plaintiff sought damages under § 1983 when she was denied a seat at a lunch counter because she was in the company of blacks. The Adickes Court held that the plaintiff stated a claim under § 1983 because service was refused under color of state law: there was a state enforced custom of segregation. 398 U.S. at 173-74, 90 S.Ct. at 1617.

the basis for liability may only be created by city "lawmakers or those edicts or acts may fairly be said to represent official policy." 436 U.S. at 694, 98 S.Ct. at 2037-38.

Finally, Monell makes clear that a city may not be held liable simply because its agent causes an injury, even a constitutional injury. As the Court cautioned, a municipality may not be held liable "solely because it employs a tortfeasor--or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." Id. at 691, 98 S.Ct. at 2036 (emphasis in original). Accord, Owen v. City of Independence, 445 U.S. 622, 633, 100 S.Ct. 1398, 1406, 63 L.Ed.2d 673 (1980).

In this case, plaintiff did not base the City's liability on the theory that the police officers injured Patillo in the process of executing an officially promulgated "policy statement, ordinance, regulation, of decision" of the City of Atlanta, 436 U.S. at 690-91, 98 S.Ct. at 2035-36. Rather, plaintiff sought to hold the City liable on the theory that the police officers injured Patillo while carrying out two alleged customs of the City, both presumably established by the supervisor defendants. The first was the custom of the Atlanta Police Department to encourage the use of excessive force in police-citizen encounters. The second was the Department's custom of selecting and training its officers improperly.[21] To prove the existence of each of these customs, the plaintiff had to establish two

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[21] Plaintiff particularly alleged that the City's custom included a failure to require officers to carry nightsticks. Presumably, Officer Sampson would not have shot Patillo had he been carrying a nightstick.

elements: that the custom has been created, and that it has been created or maintained[22] by one or more "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." Id., at 694, 98 S.Ct. at 2037-38

Addressing the first custom plaintiff cited, the district court concluded that the plaintiff failed to prove the first element, that a police department custom encouraging the use of excessive force actually existed. The plaintiff produced very little evidence of incidents in which Atlanta police officers had used excessive force in citizen encounters and nothing at all to indicate that any policy-setting official had approved of, much less encouraged, such conduct.

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[22] It is not necessary that the "law makers or those edicts or acts may fairly be said to represent official policy" actually initiate the custom in order to create it. Custom may result when such law makers or officials maintain, by implicit ratification, a policy begun by persons whose edicts or acts could not be said to represent official policy.

As for the second custom, the court made no effort to determine whether it even existed and, if it did, which officials, if any, had established it. Instead, the court focused on the question, irrelevant, under the Monell standard, of whether the Atlanta Police Department had been negligent in training Officers Craig and Sampson. The court reviewed the Department's training programs, most of which were administered its police academy, and found that the training currently given new officers was satisfactory.[23] Craig had received such training; the court therefor concluded that the Department, and thus the

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[23] The district court found that the training given new officers included psychological testing and thirteen weeks' police academy instruction.

City, had not been negligent in his case. In Sampson's case, however, the court found that the Department's training of him had been so lacking as to constitute "gross negligence" or "deliberate indifference." Sampson had joined the Atlanta police force in 1973 and received the police academy training given to new officers at that time. In 1978, he resigned from the force to pursue other unrelated employment. In 1979, Sampson returned to the force.[24] At this time he was given a one-day "reorientation" program; he then assumed the normal line officer duties. It was this one-day orientation and the Department's failure to give Sampson a psychological test (then

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[24] Sampson had been a police officer from 1973-1978. He quit the force as an officer in good standing in 1978 to pursue another career but was rehired in 1979. When he came on the force in 1973 he completed the then-standard six-week academy training. He received no psychological testing. When Officer Craig was hired, some time later, he received 13 weeks' academy training and was tested psychologically. During Sampson's five years as an officer, from 1973-1978, two citizen complaints were filed against Sampson; he was cleared on each occasion. The two performance evaluations introduced into evidence showed that Sampson scored average and above average marks, although one of the evaluations suggested that he could
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(footnote continued from previous page) "mature" and "curb his temper." There was also evidence concerning Sampson's many speeding tickets and pilfering from work before becoming an officer and his casual marijuana use while on the force.

Sampson's employment record also contains high praise for him as an officer. One month his zone commander nominated him for officer of the month due to his "determination and dedication to his duty" in clearing 30 robberies in Southwest Atlanta. He received a written commendation for a "job well done" from his lieutenant for apprehending a band of violent purse snatchers who preyed on elderly women. This arrest closed 23 cases. Before he was rehired, Sampson's former immediate supervisors were requested to comment upon his work as an officer from 1973-1978. A sergeant who supervised Sampson on morning watch described him as "one of the best officers [I] have ever known ... a very conscientious worker, very reliable and cleared as many burglaries as the rest of the watch combined." A second lieutenant described Sampson's as "very knowledgeable, conscientious and a very good worker ... we need more officers like Sampson and [I] would like to see him
(footnote continued)

being given to new officers) that the district court found to be "gross negligence" and "deliberate indifference" on the City's part.[25] The court based the City's liability for Sampson's shooting of Patillo solely on this finding.[26] It made no

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(footnote continued from previous page) back." After he was rehired, the Chief of Police wrote Sampson, in 1979, to convey thanks from two citizens, who "were highly complimentary, citing your kindness and efficiency" in a suicide case. In a November 1978 polygraph test, taken when he was seeking readmission to the police force, Sampson admitted to infrequent use of marijuana, the most recent episode being 10 months before. The polygraph report stated that "no deception" was indicated.

25. The district court did not explain how failure to test Sampson psychologically caused Patillo's injury.

26. Ironically, the district court found that the supervisors, the Mayor, the Public Safety Director, and the Chief of Police, were not responsible for the poor refresher training given Sampson. The district court hypothesized that the plaintiff may simply have named the wrong supervisors as parties defendant and as those responsible for city policy under the Monell standard. According to the court, Patillo's beating was caused by Craig and Sampson's vexation
(footnote continued)

findings concerning the retraining of other officers who had spent time off the force.

The district court erred in two significant respects in holding that the Department's gross negligence in training Officer Sampson would suffice to render the City liable under the Monell standard. First, as we have observed, Monell instructs that, unless the plaintiff's constitutional deprivation resulted from the execution of official policy or custom, the City cannot be held liable for money damages. Here, the evidence conclusively showed that the City had no official policy or custom to select and train its police officers improperly.[27] Second, the district court predicated the City's liability on the doctrine of respondeat superior, a doctrine Monell explicitly eschewed. It is true that the court, in its dispositive order, did not state that the City was liable solely because of employee gross negligence, but the logic of that order renders this conclusion inescapable: one or more unnamed City employees, probably in the police department, was negligent to the point of indifference, in failing to retain Sampson, and this negligence proximately caused Patillo's injuries.

The district court cited no binding precedent from the Supreme Court, the Eleventh Circuit or the former Fifth Circuit for its holding that the gross

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(footnote continued from previous page) at Patillo, not Sampson's poor training. Thus, the court held the City liable only for the shooting.

[27] That Officer Sampson may have been ignorant of a number of police procedures did not establish that the City had an (footnote continued)

(footnote continued from previous page) official policy or custom of putting untrained officers on the streets. See text infra.

negligence or deliberate indifference of a city agent or employee will support municipal liability for damages under section 1983, and we have found none. The court, instead, cited Leite v. City of Providence, 463 F.Supp. 585 (D.R.I. 1978), as the "leading case in this area." In Leite the plaintiff brought a section 1983 claim against the City of Providence for failing to train properly its police officers, who had beaten the plaintiff. Monell had just been handed down, and the Leite court, struggling with Monell's parameters, adopted the "deliberate indifference" standard of Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Gamble held that a section 1983 eighth amendment claim could be brought against prison officials if they showed "deliberate indifference" to the medical needs of their

inmates, thus constituting cruel and unusual punishment. Id. at 104, 97 S.Ct. at 291.

Gamble is factually and legally inapposite, as it had nothing to do with municipal liability. Moreover, neither the Supreme Court nor this circuit has made the Gamble "deliberate indifference" test applicable to fourteenth amendment due process claims against municipalities. Since Gamble preceded Monell, the Supreme Court in Monell easily could have incorporated the "deliberate indifference" standard into the municipal liability calculus had it wished to do so.

The district court cited other cases besides Leite, but none fully supports its finding of liability in this case. See Edmonds v. Dillin, 485 F.Supp. 722, 727 (N.D.Ohio 1980) ("'deliberate indifference' is not an apt standard for defining the degree of municipal culpability required under Monell"); Spriggs v. City of Chicago, 523 F.Supp. 138, 142 (N.D.Ill. 1981) ("proof of culpable policy or custom must be shown"); cf. Popow v. City of Margate, 476 F.Supp. 1237, 1246 (D.N.J. 1979) (single brutal incident insufficient to give rise to liability, but relying on Leite). See also Jackson, v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983) (rejecting gross negligence theory).

The legal prerequisite in this circuit for a finding of municipal liability under section 1983 remains that stated by the Supreme Court in Monell and by this court in Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982), and Williams v. City of Valdosta, 689 F.2d 964 (5th Cir. 1980). "Gross negligence" or "deliberate

indifference" is simply not the proper test for adjudging a due process section 1983 claim against a municipality.[28]

In summary, the plaintiff in this case presented, at best, an isolated incident in which the police officers used excessive force to restrain an arrestee. The plaintiff did not present an incident that was the product of a City or police department custom to use excessive force. As the new Fifth Circuit recently observed, such "[i]solated violations are not the persistent, often repeated, constant violations that constitute custom and policy. Occasional acts of untrained policemen [standing alone] are not attribut[able] to city policy or custom." Bennett, 728 F.2d

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[28] We see no need remand to the district court for a finding on the question of whether the Atlanta Police Department had a custom of improper selection or training of officers. The record makes it clear that there was simply no such custom under the Monell standard.

762, 768 at n. 3. Accord Berry v. McLemore, 670 F.2d 30, 32 (5th Cir. 1982) (single improper arrest not custom); McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979); see also Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir.), cert. denied sub nom. Turpin v. City of West Haven, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980) (failure to discipline officer for single incident of illegality was not official policy). Patillo's injury at the hands of Officers Craig and Sampson was not caused by their execution of official municipal policy or of custom. Accordingly, the judgment against the City of Atlanta must be reversed.

II.

A.

Plaintiff claimed that Officers Craig and Sampson denied Patillo three federal constitutional rights: the fourth amendment right to be free from unreasonable seizure, the eighth amendment right to be free from cruel and unusual punishment, and the fourteenth amendment right to due process of law. It is clear, as the district court found, that the officers had probable cause to arrest Patillo, or at least to make a brief forcible investigative detention under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), once the driver of the red van said, "That's him, he's the one." Thus, Patillo was not seized in violation of the fourth amendment. Plaintiff's eighth amendment claim was equally unavailing. The proscription against cruel and unusual punishment applies only after a criminal conviction. See United States v. Lovett, 328 U.S. 303, 317-18, 66 S.Ct. 1073, 1079-80, 90 L.Ed. 1252 (1946); Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 1872 n. 16, 60 L.Ed.2d 447 (1979). Since Patillo did not occupy a convict status, he could not have had an eighth amendment claim.

The due process clause of the fourteenth amendment states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of Law...." U.S. Const. amend. XIV § 1. Plaintiff made no claim that the officers deprived Patillo of his life or property without due process of law;[29] rather, she claimed that the officers deprived Patillo of a protected liberty interest, one's

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[29] See supra notes 8 and 16.

interest in being free from the government's use of unnecessary physical force against his person.

There is no dispute that the plaintiff's proof satisfied three prerequisites of a valid fourteenth amendment due process claim: the officers acted under color of state law; they infringed a protected liberty interest; and the injuries Patillo suffered amounted to a deprivation. "Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'" Parratt v. Taylor, 451 U.S. 527, 537, 101 S.Ct. 1908, 1913-14, 68 L.Ed.2d 420 (1981), citing Baker v. McCollan, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61

L.Ed.2d 433 (1979). Our inquiry "therefore must focus on whether [the plaintiff's decedent] suffered a deprivation of [liberty] without due process of law." Specifically, we must decide "whether the tort remedies which the State of [Georgia] provides as a means of redress for [liberty] deprivations satisfy the requirements of procedural due process." Id.

At the time of Patillo's deprivation, and, as well, at the time his administratrix instituted this action, Georgia provided tort remedies precisely for the sort of injuries Patillo sustained at the hands of the officers here. See, e.g., Stewart v. Williams, 243 Ga. 580, 255 S.E.2d 699 (Ga. 1979) (discussing state torts of intentional and negligent false imprisonment); Ga. Code Ann. § 105-601, 602 (1968 & 1981 Supp.) (battery); Thomas v. Williams, 105 Ga. App. 321, 124 S.E.2d 409

(1962) (police officer negligently permitting battery). The narrow question we must decide is whether these post-deprivation remedies satisfied the due process clause of the fourteenth amendment.

The Supreme Court has made it plain that a post-deprivation remedy will not suffice if "the deprivation ... was pursuant to some established state procedure and 'process' could be offered before any actual deprivation took place." Parratt, 451 U.S., at 537, 101 S.Ct. at 1914. See, e.g., Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (prior notice and opportunity to be heard required before trust account can be closed); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (Florida prejudgment ex parte replevin violated due process clause); Goldberg v. Kelly, 397

U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (prior notice and hearing required before state cut off welfare benefits). In each of these cases, the deprivation was authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that wrongful deprivation would occur. See also Parratt, 451 U.S. at 537-38, 101 S.Ct. at 1914 (citing cases).

The Supreme Court has held, however, that a post-deprivation remedy can satisfy due process when quick action by the government is necessary or the provision of predeprivation process is impracticable, of if the post-deprivation remedy is afforded "at a meaningful time and in a meaningful manner." Id. at 540, 101 S.Ct. at 1915, citing Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62

(1965). See, e.g., North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (prenotice destruction of tainted food; post-deprivation remedy satisfied due process); Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) (prehearing replevin permissible given adequate post-seizure remedy); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (summary seizure and destruction of misbranded drugs does not violate due process).

In Parratt, the Supreme Court held that an adequate post-deprivation remedy will suffice if the deprivation is caused by a random and unauthorized state act for which prior process impracticable or impossible.[30] In Patillo's case the conduct of the officers, the excessive use of force, was, as the district court found, plainly unauthorized. The conduct was also random; neither the City nor the officers could have predicted precisely when it

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[30] The Parratt holding did not come as a total surprise. The Supreme Court had been (footnote continued)

(footnote continued from previous page) developing the Parratt analysis for a number of years prior to Parratt. See cases cited supra text, Slip op. at p. 4486. at ____ and accompanying notes. In Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Chief of Police of Louisville, Kentucky, had circulated Davis' picture to local merchants on a flyer purporting to identify "ACTIVE SHOPLIFTERS." Davis was, in fact, not a shoplifter. Rather than sue for defamation in state court, Davis brought a 1983 action, alleging that his liberty and property were denied under color of state law without due process. Justice Rehnquist, writing for the Court, noted that the complaint was "nothing more than a claim for defamation under state law" and the due process clause did not "ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor." 424 U.S. at 698, 701, 96 S.Ct. at 1159-60. To hold otherwise would

> make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional

(footnote continued)

could occur. Indeed, Patillo's deprivation, although under color of state law, was beyond the control of the government. In sum, "it [was] not only impracticable, but impossible, to provide a meaningful hearing before the deprivation." 451 U.S. at 541, 101 S.Ct. at 1916. Given that Georgia provided Patillo an adequate post-deprivation remedy (albeit in the form of a survival action), Patillo received all the process he was due under the fourteenth amendment.[31]

(footnote continued from previous page)

> shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law....

Id., citing Griffin v. Breckenridge, 403 U.S. 88, 101-02, 91 S.Ct. 1790, 1797-98 29 L.Ed.2d 338 (1971). The Court then went on to hold that Davis had stated no claim under section 1983 because reputation, alone, is not broad enough to constitute a liberty or property interest. For an excellent analysis of Paul, see Smolla supra note 13, at 836-40.

In the next case, Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711

(footnote continued)

Plaintiff contends that the Supreme Court's rationale in Parratt does not apply in cases involving the intentional deprivation of liberty interests. She urges us to follow the teachings of commentators and other lower courts that would limit the Parratt rationale to negligent deprivations of property.[32] The logic behind Parratt and its predecessors[33] cannot be so con-

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(footnote continued from previous page) (1977), aff'g 525 F.2d 909 (5th Cir. 1976), a case from the former Fifth Circuit, the Supreme Court encountered a section 1983 class action brought on behalf of school children, who alleged that their liberty was curtailed without due process when their public school teachers paddled them for disciplinary reasons without affording them a prior hearing. The Court agreed that the children had a constitutionally protected liberty interest in bodily security but, just as in Paul, the Court noted that a time-tested and fully effective remedy for the injury existed in state law: the tort of assault and battery. The Court held that because a predeprivation hearing before every school paddling was impractical, the state remedies provided the only "process" which was due. The Court relied on the openness our schools and the historically low
(footnote continued)

stricted.

> Logically, if the post deprivation remedy cures the negligent deprivation, it should cure the intentional deprivation. If due process can be satisfied afterwards in the case of negligence, due process can be satisfied afterwards in the case of intentional talking.... [T]he Court is inclined to treat a negligent taking and an intentional taking the same way.... To the extent that the question is one for legal analysis, the path of least resistance is to say that because an adequate state remedy bars a § 1983 action for deprivation of property it also bars such a remedy for deprivation of liberty.

K. Davis, Administrative Law Treatise § 26.14 at 434-35 (1982 Supp.); accord, Smolla, The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company, 1982 U.Ill.L.Rev. 831, 833 (Parratt offers a "unified theory for handling the relationship between state tort law and federal section 1983 claims.")

Contra, Kirby, Demoting 14th Amendment Claims to State Torts, 68 A.B.A. J. 166, 167 (1982) (Parratt is "sweeping curtailment of federal civil rights litigation"); Note, A Theory of Negligence for Constitutional Torts, 92 Yale L.J. 683, 691-95 (1983).

Several courts have adopted the view that the Parratt rationale must apply to reckless and intentional deprivations of both liberty and property. See Palmer v. Hudson, 697 F.2d 1220, 1222-23 (4th Cir. 1983) (intentional property destruction); Engblom v. Carey, 677 F.2d 957, 964-66 (2d Cir. 1982); Ellis v. Hamilton, 669 F.2d 510, 514-16 (7th Cir. 1982), cert. denied, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1983); Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir.

(footnote continued from page 136)
incidence of padding abuse by teachers to
(footnote continued)

1981) aff'd on other grounds sub nom. Kush v. Rutledge, ____ U.S. ____, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983) (assault and battery by state college football coach);[34] Spriggs v. City of Chicago, 523 F.Supp.

(footnote continued from previous page)
conclude that "the Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common law constraints and remedies." 430 U.S. at 676, 97 S.Ct. at 1419. Ingraham thus stands for the proposition that when a predeprivation process is impracticable a state may, at least in some situations, still intentionally deprive a person of liberty so long as the state provides adequate and effective post-deprivation remedies, usually in the form of a tort action. Because of the undesirability or impracticality of affording pre-deprivation process, full process is available after the deprivation and the procedural protections of the due process clause of the fourteenth amendment are not impaired. The Ingraham analysis is consistent with prior Supreme Court cases where pre-deprivation hearings were impractical or impossible. See cases cited supra text Slip op. at p. 4486, at ____; see also Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947); (bank failing); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (termination of Social Security benefits).

The Supreme Court encountered a third
(footnote continued)

138, 143 n. 5 (N.D.Ill. 1981) (plaintiff beaten by police); Barnier v. Szentmiklosi, 565 F.Supp. 869 (E.D.Mich. 1983) (plaintiff beaten by police) (citing cases).

To support her argument that Parratt must be restricted to its facts, plaintiff cites Justice Blackmun's concurring opinion in Parratt in which he stated that the majority's rationale applied only to negligent deprivations of property. Justice Blackmun gave no reason for treating "liberty" different from "property" under the fourteenth amendment,[35] and such

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(footnote continued from previous page) section 1983 deprivation of liberty case in Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), rev'g McCollan v. Tate, 575 F.2d 509, 511 (5th Cir. 1978). In that case the plaintiff was arrested on a facially valid warrant which was intended for his brother. The mistake was caused because the brother had used the plaintiff's driver's license which was altered so that it sported the brother's photograph. The plaintiff protested his innocence for eight days and was released when the sheriff finally discovered that he
(footnote continued)

a distinction is contrary to Ingraham v. Wright,[36] 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), in which the Court held that post-deprivation common law remedies provided all the process due a school child

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(footnote continued from previous page) had the wrong man. In addressing this case the former Fifth Circuit relied totally upon tort law principles, in effect reading the false imprisonment portion of the Second Restatement of Torts into the fourteenth amendment. See 575 F.2d at 512-13. The Supreme Court, again through Justice Rehnquist, reversed; the High Court held that plaintiff may have made out a prima facie case for the state tort of false imprisonment, but that claim did not rise to a fourteenth amendment claim just because the defendant was a state official. The Court stated, "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." 443 U.S. at 146, 99 S.Ct. 2696-97.

The Court then surveyed the sheriff's procedures for verifying the identity of his prisoners. Although the procedures did not totally eliminate the chance of error, they were found adequate and the warrant was facially valid; thus, plaintiff had not been deprived of due process. The Court made clear that it was aware of existing
(footnote continued)

whose liberty has been deprived by (intentic al) paddling by school authorities. The *Parratt* majority said that its analysis was "quite consistent" with the analysis it adop in *Ingraham*. 451 U.S. at 542, 101 S.Ct. at 1916. We think a proper reading of *Parratt* its predecessors, and the better reasoned lo court cases and scholarly articles, support application of *Parratt*'s rationale to cases involving intentional deprivations of liberty.[37] But *cf*. text slip op. at 4490-4491, at ____-____. The due process claim in *Ingraham* failed even though the plaintiff proved an intentional deprivation of liberty.[38] *See also* *Smolla*, *supra* at 874 n. 185. Moreover, *Parratt* itself held that the defendant's state of mind is irrelevant in assessing whether the plaintiff has a cause of action under section 1983, 451 U.S. at 534, 101 S.Ct. at 1912. Whether a deprivation is sudden and intentional or merely negligent, the state cannot practically provide pre-deprivation process.[39]

(footnote continued from previous page) remedies in state court although this was not a main basis for the holding. One perceptive commentator has noted that in *McCollan*:

> The only place that adequate due process could have existed ... was after-the-fact, in the form of money damages. No pre-deprivation due process could possibly have been provided, since the state officials thought that they had their man. The state officials, because of the warrant, thought that pre-deprivation process *had* taken place.... In such a situation the only relief that can be afforded ... is money damages, and ... state tort remedies alone ought to be

(footnote continued)

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> sufficient.

Smolla, *supra* note 13, at 853 (emphasis in original).

The *Parratt* holding was also foreshadowed by *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975) *modified* *en* *banc*, 545 F.2d 565 (1976), *cert*. *denied* 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 529 (1978), a case written by Justice Stevens when he sat on the Seventh Circuit. There, a prisoner claimed in a section 1983 due process suit that his jailers negligently caused the loss of his property. The *Bonner* court, 517 F.2d at 1319, dismissed the claim, holding:

(footnote continued)

Finally, we find nothing in the debates that surrounded the adoption of the fourteenth amendment that indicates that the framers intended that liberty and property interests receive different treatment.

(footnote continued from previous page)

> [T]here is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers.... For in [the latter case] ... the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards... [T]he existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law....

The *Parratt* Court cited *Bonner* as the "proper manner" in which to approach the plaintiff's due process claim. The Court also noted that *Bonner* was "quite consistent" with the approach taken in *Ingraham* even though *Ingraham* involved intentional invasions of a liberty interest (footnote continued)

Having denied plaintiff's constitutional claim against the officers, we must add a caveat. Section 1983 creates no substantive rights. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600,

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(footnote continued from previous page) rather than negligent loss of property. 451 U.S. at 542-43, 101 S.Ct. 1916. The *Parratt* Court added emphasis to a quote from *Ingraham* showing that the key to *Ingraham*--like *Bonner*--was "*the common law safeguards that already exist*." *Id.* at 543, 101 S.Ct. at 1917 (emphasis in original).

31. *See supra* text Slip op. at 4485. The due process clause did not "*ex proprio vigore* extend to [Patillo] a right to be free of injury wherever the State may be characterized as the tortfeasor." *Paul*, 424 U.S. at 698, 701, 96 S.Ct. at 1160. *Accord Williams v. Kelley*, 624 F.2d 695 at 697-98.

32. *See Tarkowski v. Hoogasian*, 532 F.Supp. 791, 795 (N.D.Ill. 1982); *Scott v. Donovan*, 539 F.Supp. 255, 258 (N.D. Ga. 1982); *Howse v. DeBerry Correctional Inst.*, 537 F.Supp. 1177, 1178 (M.D.Tenn. 1982). *See also Parratt*, 451 U.S. at 545-46, 101 S.Ct. at 1918 (Blackmun, J., joined by White, J., concurring) (*Parratt* limited to negligent property deprivations). *See also infra* text Slip op. at p. 4488.

617, 99 S.Ct. 1905, 1916, 60 L.Ed.2d 508 (1979). Plaintiff filed suit in federal court under 42 U.S.C. § 1983 (1982) seeking a review under the U.S. Constitution of the deprivation of Patillo's liberty. Except for matters the district court dismissed as frivolous, the plaintiff did not allege any violation of substantive guarantees of the federal Constitution. Like the plaintiff in Parratt, the plaintiff here "refer[red] to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment simpliciter." Parratt, 451 U.S. at 536, 101 S.Ct. at 1913. See Williams v. Kelley, 624 F.2d

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33. See supra note 30, and cases cited supra text Slip op. at pp. 4485-4486, at ____-____.

34. The Ninth Circuit addressed this issue in Rutledge, 660 F.2d at 1345, a case where a football player for Arizona State University brought a due process section
(footnote continued)

695, 697 (5th Cir. 1980) (death-causing chokehold by police state no section 1983 claim; "federal [civil] rights protection [is] far less extensive than that afforded by the common law of battery and negligence"). Thus our holding today is in line with Duncan v. Poythress, 657 F.2d 691, 704 (5th Cir. Unit B 1981), where the plaintiff's claim was held to be not barred by Parratt because it was based on the substantive due process right to vote. See Wells & Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 Ga. L.Rev. 201 (1984). Additionally, the acts of the police here, although most unfortunate, did not "offend those canons of decency and fairness which express the notions of English-speaking peoples even toward those charged with the most heinous

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(footnote continued from previous page)
1983 against a coach when the coach
(footnote continued)

offense" or "shock the conscience,"[40] so as to violate the substantive due process guarantees "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

B.

The district court denied plaintiff's pendent state law claims against the officers for false imprisonment and false arrest because they were frivolous. We affirm this holding. The court held that the pendent assault battery claim (count two) had merit, but denied the claim because it would result in damages duplicative of those awarded for the awarded for the fourteenth amendment due process violation (count one). This was error; the facts the court found concerning the beating and shooting supported state tort liability. Assuming that the elements of compensatory and punitive damages under the section 1983 and assault and battery claims were the same, the court should have given the plaintiff one money judgment, based on both claims. The parties have not briefed this damages issue, however, therefore, we remand it to the district court for further exploration.

IV.

Plaintiff's count one 42 U.S.C. § 1983 (1982) claim against the supervisors is subject to the same Parratt analysis we applied to her claim against the police

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(footnote continued from previous page) assaulted him. Assuming that the coach deprived the player of constitutionally protected liberty, the court held that the deprivation was not without due process as defined by Parratt. The liberty denial was random, could not have been accompanied by predeprivation process, and post-
(footnote continued)

officers; we look to Georgia law to determine what post-deprivation tort remedies were available to the plaintiff and whether those remedies were adequate. Our canvas of the Georgia statutory and case law leaves us in considerable doubt as to whether the plaintiff had adequate remedies against the supervisors for the injury Patillo sustained. Compare Massey v. Perkerson, 129 Ga. App. 895, 201 S.E.2d 830 (1973) (police chief not liable for tort of subordinate unless he was present, ordered, or supervised the conduct) with Ga. Code Ann. § 24-2812 (1981) (sheriff liable for tortious conduct of deputies in the line of duty). We need not resolve this doubt, however, because another issue is dispositive of the plaintiff's claim.

(footnote continued from page 148) depreviation state remedies were sufficient. 660 F.2d at 1352. Accordingly, Parratt, as applied to the
(footnote continued)

The district court denied the plaintiff's due process claim against the supervisors because there was no "affirmative link" between their alleged negligence and the deprivation of Patillo's liberty.

(footnote continued from previous page) facts of Rutledge, impelled the conclusion "that the alleged deprivation was not without due process of law." Id. Wakinekona v. Olim, 664 F.2d 708 (9th Cir. 1981) (as amended on denial of reh'g and reh'g en banc) (attack on state regulations governing interstate transfer of prisoners), rev'd, ____ U.S. ____, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983), can be read as constraining a wide application of Rutledge and Parratt. Olim has been subjected to some very telling criticism in this regard. See Smolla, supra note 14, at 863-65. The Parratt issue was actually a minor one in Olim, and Olim is best read as a case similar to Logan, infra note 39, involving a deprivation pursuant to an established state procedure. The Supreme Court did not discuss the Parratt issue in reversing Olim. Accord, Barnier, 565 F.Supp. at 880-81. Cf. Frost v. City and County of Honolulu, 58[illegible] F.Supp. 356 (D.C.Hawaii, 1984) (limiting Parratt).

35. Justice Rehnquist wrote the opinion and was joined without comment by the Chief Justice and Justices Brennan and Stevens. Justice Powell concurred only in the result, because to him mere negligence
(footnote continued)

Rizzo v. Goode, 423 U.S. 362, 371, 96 S.Ct. 598, 604, 46 L.Ed.2d 561 (1976), teaches that to prevail against persons in a supervisory role the plaintiff must demonstrate an "affirmative link" between his depriva-

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(footnote continued from previous page) could not cause a constitutional deprivation. Justice Stewart concurred briefly, stating that the injury was not of constitutional proportions. Justice Marshall concurred in part and dissented in part; he viewed the state remedy as inadequate. It is apparent that only Justices Blackmun and White would limit Parratt to negligent deprivations of property.

36. See supra note 30. One reason given for subjecting property interests but not liberty interests to the Parratt analysis is that property, once taken away, can be fully recompensed later through post-deprivation money damages, while liberty, once taken, cannot be returned to the status quo ante because liberty cannot be adequately valued or measured. For example, a person struck by a policeman cannot be "unstruck," but if a policeman merely destroys the person's car, the car can be fully replaced by state tort law damages. This argument, suggested by Professor Irene Rosenberg in Ingraham v. Wright: The Supreme Court's Whipping Boy, 78 Colum.L.Rev. 75, 90-91 (1978), is contrary to elementary notions of tort law
(footnote continued)

tion and "the adoption of [a] plan or policy by [the supervisors]-express or otherwise-showing their authorization of approval of such misconduct."[41] Id. A "mere right to control" is not enough.

(footnote continued from previous page) and was clearly foreclosed by Ingraham, supra.

37. See also, e.g., Monaghan, Of "Liberty" and "Property", 62 Cornell L.Rev. 405, 431 (1977):

> [p]rior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law.

38. See supra note 30.

39. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), does not apply to the case before us because here the deprivation was not pursuant to an established state procedure. In Logan the plaintiff's chose in action
(footnote continued)

Monell, 436 U.S. at 694 n. 58, 98 S.Ct. at 2037 n. 58, citing Rizzo, 423 U.S. at 370-71, 96 S.Ct. at 602. The district court found no such link; its findings of fact on this issue are not clearly erroneous,

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(footnote continued from previous page) for employment discrimination was destroyed by the Illinois Fair Employment Practices Commission because it negligently failed to hold a fact finding hearing within 120 days of the filing of plaintiff's complaint. The Illinois Supreme Court dismissed the discrimination charge because of the Commission's negligence, stating that plaintiff had no liberty or property interest in the chose in action as it was purely a grant from the legislature, which could provide for its extinguishment. Plaintiff then appealed to the U.S. Supreme Court.

The Supreme Court reversed. It relied on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), to hold that a chose in action is a property interest and the state had negligently destroyed it, thus violating plaintiff's fourteenth amendment due process right. According to the Logan Court, Parratt was inapposite. Parratt involved "a random and unauthorized act by a state employee, [and] not a result of some established state procedure." Logan 102 S.Ct. at 1158. In Logan, however, the state "by operation of law [destroyed the property, and] Parratt was not designed to (footnote continued)

Fed.R.Civ.P. 52(a), and its conclusions of law were correct. The court's judgment in favor of the supervisors on count one must, accordingly, be sustained.

(footnote continued from previous page) reach such a situation." Id. See Smolla, supra note 13, at 859-62. The Logan Court also distinguish Ingraham. Ingraham differed from Logan because state tort remedies provided adequate post-deprivation process. The state system in Ingraham "preserved what 'has always been the law of the land'" while the property in Logan was terminated haphazardly by an established state procedure, "hardly a practice in line with our common-law traditions." Id. at 1158 n. 14.

Summarizing the relationship of Parratt to Logan in his trenchant essay Professor Smolla stated:

> Random and unauthorized harm caused by the state, for which the state itself provides a remedy, does not implicate the Constitution. But when the state consciously enacts a system that places its imprimatur on arbitrary conduct ... through ... a capricious administrative structure for handling handicap discrimination, federal court intervention under the due process clause is warranted.

Smolla, supra noter 13, at 862.

In the instant case, unlike the situation in Logan, plaintiff did not prove a deprivation caused by an established (footnote continued)

With respect to the plaintiff's pendents state law claims against the supervisors, which the district court summarily rejected, it is clear from the record that the plaintiff cannot prevail on her clams of false imprisonment (count three) and false arrest (count four). We cannot determine, however, from the court's dispositive findings and conclusions the basis for such rejection of plaintiff's

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(footnote continued from previous page) state procedure. The deprivation was caused instead by an unpredictable and unauthorized act. Parrant shows that in such a case due process can be satisfied by an adequate post-deprivation hearing, e.g., a state tort suit.

40. Rochin v. California, 342 U.S. 165, 169, 172, 72 S.Ct. 205, 208, 96 L.Ed. 183 (1952). For an excellent discussion of the somewhat nebulous concept of substantive due process, see Barnier v. Szentmiklosi, 565 F.Supp. 869 (E.D.Mich. 1983).

41. Rizzo v. Goode was a suit for equitable relief. Other courts have found the Rizzo analysis persuasive in claims for money damages, and we do also. E.g. Delaney v. Dias, 415 F.Supp. 1351, 1354 (D.Mass. 1976); Leite, 463 F.Supp. at 590.

assault and battery claim against the supervisors (count two) and thus cannot review the sufficiency of that claim. We therefore vacate the court's judgment in favor of the supervisors on count two and remand it for further findings of, fact and conclusions of law.

V.

In conclusion, as to the City of Atlanta, we REVERSE the district court's judgment on count one and direct the court, on receipt of the mandate, to enter judgment for the City.*

As to Officers Craig and Sampson, we REVERSE the district court's judgment on count one and direct the court, on receipt of the mandate, to enter judgment in the officers' favor; we VACATE the court's judgment on count two and REMAND the case as to that count, directing the court to hold the officers liable to the plaintiff, in accordance with the court's previous findings of fact an conclusions of law, and to assess plaintiff's damages against them in accordance with Georgia law, we AFFIRM the court's judgment on counts three and four.

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* See supra note 15. We do not read plaintiff's cross-appeal, and her briefs to us, as having embraced the district court's judgment for the City on counts two, three, and four. Therefore, we have not addressed the question of whether the City could have been held liable on any of these counts.

As to the supervisors, the Mayor, Public Safety Director and Chief of Police, we AFFIRM the court's judgment on counts one, three, and four; we VACATE the court's judgment on count two and REMAND the case as to that count for the entry of findings of fact and conclusions of law.

We REVERSE the district court as to the issue of attorneys' fees under 42 U.S.C. § 1988 (1982) against the City of Atlanta and Officers Craig and Sampson.

We REVERSE the judgment of costs against the City of Atlanta; we VACATE the judgment of costs against Officers Craig and Sampson, without prejudice to plaintiff's right to seek the taxation of costs at the conclusion of this litigation.

[___ F.2d ___]

EMMA F. Gilmere, individually and as Administratrix of the Estate of Thomas E. Patillo, and for the benefit of his next of kin, Plaintiff-Appellee, Cross-Appellant,

v.

CITY OF ATLANTA, GEORGIA, et al., Defendants-Appellants, Cross-Appellees.

Nos. 82-8457, 82-8760

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

Oct. 15, 1985

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

VANCE, Circuit Judge:

On New Year's Day in 1980, Thomas Patillo died at the hand of an Atlanta policeman. We accepted this case for en banc consideration primarily to determine whether Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), precludes a claim by his administratrix under 42 U.S.C. § 1983 because state tort law provides a comparable remedy.

I

The facts as found by the district court disclose that after drinking heavily and driving about Atlanta throughout New Year's Day, Thomas Patillo had a near-collision with a van and then got into an argument with the van's driver. Afterward, the driver called the police and reported that Patillo had pulled a gun from the trunk of his car and threatened him. When Officers Sampson and Craig arrived at

Patillo's home, they ordered him to the police car for questioning. Patillo initially put up some resistance by attempting to flee and then flailing his arms about, but these efforts were ineffectual because of his drunken condition. The officers then began escorting him by force and, according to eyewitnesses, began beating him about the head. As the party neared the patrol car, Patillo broke free of their hold. During the ensuing scuffle, Sampson shot Patillo in the stomach and killed him.[1]

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[1] Reports of what happened in the seconds before the shooting diverged significantly. The officers testified that Patillo broke away, grabbed Craig's gun from the holster, and had begun to level it at Sampson when Sampson drew his revolver and fired twice. None of the eyewitnesses saw Patillo reach for Craig's revolver, and none of them saw a gun in Patillo's hand at any time. The court weighed this conflicting testimony and concluded: [T]he officers were striking Patillo as he tried to break away. When he did break away, he reached for Craig's revolver. In the ensuing scuffle,
(footnote continued)

Patillo's sister, as administratrix of his estate, sued the police officers, their supervisors and the City of Atlanta under 42 U.S.C. § 1983 for violations of his fourth, eighth and fourteenth amendment rights and under state tort law. After a bench trial, the district court held that: (1) both police officers were liable under section 1983 for beating Patillo; (2) Sampson was liable under section 1983 for shooting Patillo; (3) the city was liable under section 1983 for training Sampson in a grossly negligent manner; (4) the police officers' supervisors were not liable because the plaintiff had failed to prove an "affirmative link" between the supervisors' conduct and Patillo's injuries as

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the revolver was knocked to the ground. At that point, Patillo lunged toward Sampson, who reacted by drawing his own revolver and shooting Patillo twice at close range in the abdomen.

required by *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); and (5) the plaintiff's state law claims either were frivolous or would result in damages that would duplicate those already awarded under section 1983. A panel of this court reversed the district court on the first two grounds, concluding that *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), precluded the plaintiff's claims against the police officers because state tort remedies were available to provide redress for the beating and shooting. It also reversed the finding of liability against the city on the ground that municipal liability cannot predicated on negligence but rather requires proof that the constitutional violations resulted from policies or customs actually developed or affirmatively sanctioned by the city's policymakers. It upheld the district court on the supervisory liability issue and remanded for reconsideration of the state law assault and battery claims in light of its decision to vacate the parallel section 1983 claims. *Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir. 1984). We address each of the district court's holdings in turn.

II

The initial and primary focus of our concern is whether *Parratt* precludes the plaintiff from bringing a section 1983[2] suit against the police officers because there exists a basis for liability under state tort law. Parratt involved a claim by a prisoner against state prison administrators for the negligent deprivation of some mail-order hobby materials valued at $23.50. The Court noted initially that "one might well inquire why respondent brought an action in federal court to recover damages of such a small amount for negligent loss of property." 451 U.S. at 529, 101 S.Ct. at 1910. The Court then went on to hold that the due process clause was not violated because "the deprivation did not occur as a result of some established state procedure," id. at 544, 101 S.Ct. at 1917, and because the state provided adequate procedural due process through its tort claims statute. Id. The tenor of the Court's decision makes clear that its principal concern was to prevent

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[2] 42 U.S.C. § 1983 reads in relevant part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....

the trivialization of section 1983 into "'a font of tort law to be superimposed upon whatever systems may already be administered by the States,'" id. at 544, 101 S.Ct. at 1917 (quoting Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976)). The precise scope of the holding remains uncertain, however, and courts throughout the federal circuits have struggled to formulate a workable set of criteria for determining its applicability to other fact situations and other constitutional claims. Some courts have read the case broadly to foreclose section 1983 relief when it overlaps state tort remedies. See, e.g.; Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983), cert. granted, ___ U.S. ___, 105 S.Ct. 1168, 84 L.Ed.2d 320 (1985); State Bank of St. Charles v. Camic, 712 F.2d 1140, 1147 (7th Cir. 1983), cert. denied, ___ U.S. ___, 104

S.Ct. 491, 78 L.Ed.2d 686 (1983); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd on other grounds*, *Kush v. Rutledge*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983). Other courts have sought to make principled distinctions between *Parratt* and the cases before them, reasoning that the Supreme Court could not have meant to deny every section 1983 plaintiff his day in federal court, no matter how egregious the constitutional violation, simply because of the available of a similar tort action. *See*, *e.g.*, *Brewer v. Blackwell*, 692 F.2d 387, 394-95 (5th Cir. 1982); *Duncan v. Poythress*, 657 F.2d 691, 704-05 (5th Cir. Unit B 1981); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A 1981). With these conflicting concerns in mind, we turn our attention to the situation before us-the intentional infliction of personal injury and death by means of

excessive police force-and we conclude that the legislative history behind the statute, the Supreme Court's own pronouncements in other cases, and the limits set by the Court in *Parratt* itself all indicate that its holding does not extend to the constitutional claims asserted here.[3]

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[3] We recognize the significance of the problem that the Court was attempting to address in *Parratt*. Because prisoners' lives are comparatively more regulated by government officials than are the lives of unincarcerated persons, a logical development accompanying the expansion of section 1983 liability has been significant increase in the numbers of prisoner claims filed in federal court. *See* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Cases in the Federal Courts*, 92 Harv.L.Rev. 610 (1979). This expansion has strained the resources of the federal courts, and the frivolous nature of many of the claims has arguably led some courts to treat even those few with merit to little more than summary justice. *See* *id*. We trust, however, that the Court's attempt to remedy the particular problem of frivolous prisoner suits in *Parratt* was not intended to extend to claims such as the one before us, which allege harms much graver than that involved in that case.

The legislative history of section 1983 had been outlined many times. See Pasty v. Board of Regents, 457 U.S. 496, 502-08, 102 S.Ct. 2557, 2561-63, 73 L.Ed.2d 172 (1982); Mitchum v. Foster, 407 U.S. 225, 238-42, 92 S.Ct. 2151, 2159-62, 32 L.Ed.2d 705 (1972); McNeese v. Board of Education, 373 U.S. 668, 671-72, 83 S.Ct. 1433, 1435-36, 10 L.Ed.2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 171-83, 81 S.Ct. 473, 475-82, 5 L.Ed.2d 492 (1961). Whereas one may well need to look hard before finding a congressional intent to make a federal case out of a negligent deprivation of a prisoner's hobby kit, the debates do indicate that a primary motivation behind the passage of the statute was the desire to eliminate the physical violence that was being visited on citizens by those entrusted to keep the peace. Originally called the Ku Klux Klan Act because of

its focus on eliminating Klan activities which were terrorizing the South, the Act also was concerned with affording a federal remedy "against incursions under the claimed authority of state law...." Mitchum, 407 U.S. at 239, 92 S.Ct. at 2160. Congress further indicated that both the egregious nature of the harms being reported and the inefficacy of remedies sought in the state courts made the situation serious enough to warrant direct supervision by the federal courts regardless of the existence of comparable remedies under state law. Patsy, 457 U.S. at 502-08, 102 S.Ct. at 2561-63. The harm alleged in this case resulted from exactly the sort of official brutality which prompted passage of the Act. Whether or not the motivations behind police brutality have changed since 1871, and whether or not we may believe that the state courts actually do a better job of affording redress for those harms today, see Neuborne, The Myth of Parity, 90 Harv.L.Rev. 1105 (1977), the statutory grant of federal jurisdiction over section 1983 suits indicates that Congress, at least, continues to adhere to the belief that police abuse is a sufficient threat to constitutional rights t warrant "a federal right in federal courts." Monroe, 365 U.S. at 180, 81 S.Ct. at 480.

The Supreme Court's pronouncements in a number of cases indicate likewise that it would not relegate the victim of an intentional and unjustified beating or killing to state tort law in all circumstances. Monroe, the case which opened the door to the expansion of section 1983 litigation by recognizing that the statute created a private right of action, involved an instance police abuse. 365 U.S. at 169, 81 S.Ct. at 474. In Jones v. Hildebrant, 432 U.S. 183, 185, 97 S.Ct. 2283, 2285, 53

L.Ed.2d 209 (1977), the Court assumed without discussion that the mother of a child who was intentionally shot and killed by a policeman acting under color of state law could sue directly under section 1983 notwithstanding the existence of a state wrongful death statute. See also Wilson v. Garcia, ___ U.S. ___, ___, 105 S.Ct. 1983, 1949, 85 L.Ed.2d 254 (1985) ("Congress ... intended that the remedy provided in § 1983 be independently enforceable whether or not it duplicates a parallel state remedy"). The Court has repeatedly made clear that the right bring an action under section 1983 need not depend on the exhaustion of state judicial or administrative procedures; see, e.g., Patsy, 457 U.S. at 503, 102 S.Ct. at 2561; Steffel v. Thompson, 415 U.S. 452, 472-73, 94 S.Ct. 1209, 1222-23, 39 L.Ed.2d 505 (1974); Gibson v. Berryhill, 411 U.S. 564, 574, 93 S.Ct. 1689, 1695, 36 L.Ed.2d 488 (1973); McNeese, 373 U.S. at

671-73, 83 S.Ct. at 1435-36. Thus, access to federal court under section 1983 is not in general predicated on actual proof of a failure of the state adjudicatory system. Finally, in Parratt itself the Court indicated that its analysis was not based upon the conclusion that all section 1983 claims were to be turned into state torts whenever possible, but rather that the particular constitutional violation at issue-the deprivation of procedural due process-simply did not occur until the plaintiff was actually denied any procedure for redress in the state system. See Parratt, 451 U.S. at 541-44, 101 S.Ct. at 1916-17. Such reasoning implicitly distinguishes procedural due process claims from all the other constitutional violations that are complete regardless of the subsequent adjudicative procedures being used. See also Hudson v. Palmer, ___ U.S. ___, ___,

n.4, 104 S.Ct. 3194, 3208 n.4, 82 L.Ed.2d 393 (1984) (Stevens, J., concurring in part and dissenting in part).

Having thus found that the scope of Parratt is necessarily limited by both the legislative history of section 1983 and the Supreme Court's own pronouncements, we perceive at least two alternative constitutional theories, neither of which was addressed by the Court in Parratt, on which this plaintiff may predicate her section 1983 claim for relief against the police officers. We will first consider the claim under substantive due process and then analyze the substantive fourth amendment claim.

A

The first potential basis for plaintiff's recovery is substantive due process. As Justice Blackmun noted in his concurrence in *Parratt*, "there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process." 451 U.S. at 545, 101 S.Ct. at 1918 (citations omitted).[4] Those courts of appeals which have addressed substantive due process claims since *Parratt* have been nearly unanimous in adopting Justice Blackmun's view that substantive due process claims still survive in the wake of *Parratt*. *See*, *e.g.*, *Hall v. Sutton*, 755 F.2d 786 (11th Cir. 1985); *Daniels v. Williams*, 720 F.2d at 796 n.3; *State Bank of St. Charles v. Camic*, 712 F.2d at 1147 n.5; *Wolf-Lillie v. Sonquist*, 699 F.2d 864,

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[4] Some courts have adopted yet another limitation articulated by Justice Blackmun in *Parratt*; "I do not read the Court's opinion as applicable to a case concerning deprivation of life or liberty." 451 U.S. at 545, 101 S.Ct. at 1918. (Blackmun, J., concurring). *See*, *e.g.*, *Wilson v. Beebe*, 743 F.2d 342, 348 (6th Cir. 1984); *Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982). *See also* *Hudson v. Palmer*, ___ U.S. ___, ___, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984) ("*Parratt* is necessarily limited by its facts to negligent deprivations of property.") *Cf.* *Kimbrough v. O'Neil*, 523 F.2d 1057, 1065 (7th Cir. 1975) (Stevens, J., concurring) (distinguishing property deprivations from liberty deprivations on the ground that the former can be satisfied by a postdeprivation hearing), *opinion on rehearing en banc*, 545 F.2d 1059 (7th Cir. 1976). This distinction is supported by the rationale that since *Parratt's* intent is to exclude the less egregious harms from the scope of constitutional analysis, and since life or liberty interests, unlike property interests, cannot be fully

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(footnote continued from previous page) protected by affording postdeprivation remedies, only property rights are within the scope of the *Parratt* analysis. While we recognize that life and liberty hold a higher place than property in the hierarchy of constitutional interests, *compare* *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (property interests are not created by the constitution, but are defined by independent standards such as state law) with *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 94 S.Ct. 2963, 2974-75, 41 L.Ed.2d 935 (1974) (there exists a core of liberty interests protected by the constitution itself regardless of state law), our disposition of this case makes it unnecessary for us to use this form of analysis.

872 (7th Cir. 1983); Duncan v. Poythress, 657 F.2d at 704-05. We too conclude that, notwithstanding Parratt, the substantive due process claim established in this case may be asserted in federal court regardless of the existence of parallel state tort remedy.

Unlike procedural due process claims, which challenge the adequacy of the procedures used by the government in deciding how to treat individuals, substantive due process claims allege that certain governmental conduct would remain unjustified even if it were accompanied by the most stringent of procedural safeguards. Such substantive claims are outside the scope of Parratt because the constitutional violation is complete at the moment when the harm occurs. The existence of state

postdeprivation remedies thereof has no bearing on whether the plaintiff has a constitutional claim.

[5] The nature of a substantive due process claim in the police abuse context was given broad outline in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), in which the Supreme Court held inadmissible incriminating evidence which had been obtained by subjecting the suspect to a stomach pump. As the Court explained, substantive due process is violated when the government engages in actions which "'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" 342 U.S. at 169, 72 S.Ct. at 208 (quoting Malinski v. New York, 324 U.S. 401, 416-17, 65 S.Ct. 781, 788-89, 89 L.Ed. 1029 (1945)). The

Court conceded at that time that "[t]hese standards of justice are not authoritatively formulated anywhere as though they were specifics," id., and concluded only that substantive due process is violated by state conduct that "shocks the conscience" or constitutes force that is "brutal" and such as "to offend even hardened sensibilities." Id. at 172-73, 72 S.Ct. at 209. Since Rochin, however, the lower courts have developed more definite standards for identifying substantive due process violations. As noted in the seminal case of Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973), the violations which give rise to a substantive due process claim are necessarily more egregious than those which give rise to simple tort actions. In Judge Friendly's words,

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 1033. The predecessor to this circuit has adopted the Johnson v. Glick factors as the guiding standard for substantive due process claims, see Williams v. Kelley, 624 F.2d 695, 697, (5th Cir. 1980), cert. denied, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 391 (1981); Hamilton v. Chaffin, 506 F.2d 904, 909 (5th Cir. 1975), Cf. Tolbert v. Bragan, 451 F.2d 1020 (5th Cir. 1971).

The court below properly cited the Johnson factors in addressing the plaintiff's substantive due process claim. It found on the basis of those factors that both police officers were liable for beating Patillo, and that Sampson was liable for shooting him. It therefore remains only for us to determine whether the court was correct in applying the Johnson factors to the facts before it.

In holding both officers liable for beating the decedent, the court found that the beating occurred "with little or no provocation" and that "the blows were not delivered in a good faith effort to control Patillo, but rather out of irritation at his initial resistance...." If supported by the record, these findings would suffice to make out a substantive due process violation under both Johnson and Rochin. Our reading of the record discloses that the court's findings have evidentiary support. Those findings were based on the lack of independent evidence that Patillo provoked the beating in any significant way; by the fact that he was an older, smaller, and unarmed man who was clearly intoxicated; and by credibility evaluations of the officers and of numerous eyewitnesses who testified. We therefore see no reason to disturb this aspect of the district court's holding.

The court also held Sampson liable on substantive due process grounds for the shooting of Patillo. As it noted, such action clearly implicated at least one of the Johnson factors in that the injury inflicted constituted the most serious harm possible. The district court found that Sampson's purported fear of bodily injury was subjectively reasonable, given that at the time of the shooting the decedent was apparently free and moving toward him. The court declared, however, that the issue of whether Sampson's use of deadly force was reasonable was "a close question." It ultimately decided "with some hesitation" that Officer Sampson's belief that his life was in danger was not objectively reasonable and could not justify the killing. In another context we might have difficulty concluding that these findings establish a constitutional violation sufficiently egregious to "shock the conscience" as required by Rochin. Here, however, any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse. We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power. For this reason, we affirm this portion of the district court's holding as well.

B

[7,8] The plaintiff also asserted a claim against both police officers under the fourth amendment,[5] which provides in relevant part that "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures shall not be violated." As the Supreme Court recognized in Monroe, a violation of the fourth amendment gives rise to a private cause of action under section 1983. See also Wolf-Lillie v. Sonquist, 699 F.2d 864, 871 n.13 (7th Cir. 1983); Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. Unit A 1981); Jenkins v. Averett, 424 F.2d 1228,

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[5] The district court's opinion noted that the plaintiff had asserted a fourth amendment claim for unreasonable seizure, but the court did not squarely address the merits of that claim. We find that the issue is properly before us because the plaintiff reasserted it in her brief before this court. As for the eighth amendment claim, we express no opinion because plaintiff does not press it in her appeal.

1232 (4th Cir. 1970). The existence of state tort remedies is no bar to the direct assertion of such a claim in federal court. As noted in *Monroe*, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183, 81 S.Ct. at 482. The Court in *Parratt* took pains to avoid disturbing this aspect of *Monroe*, acknowledging that section 1983 claims involving a violation of an enumerated constitutional right were substantively different from those based solely on fourteenth amendment due process. *Parratt*, 451 U.S. at 536, 101 S.Ct. at 1913. *See also* *Hudson v. Palmer*, ___ U.S. ___, 104 S.Ct. 3194, 3210 n.9, 82 L.Ed.2d 393 (1984) (Stevens, J., concurring in part and dissenting in part). The sole issue before us in evaluating this claim, therefore, is whether the plaintiff made out the elements of an unreasonable seizure.

As the Court noted, "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, ___ U.S. ___, ___, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). Under that standard, a seizure clearly occurred in the case before us. A seizure is not unconstitutional, however, unless it is "unreasonable." Reasonableness is to be determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* at ___, 105 S.Ct. at 1699 (quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2639, 2642, 77 L.Ed.2d 110 (1983)). In conducting this balancing test, we are to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979).

Here we have little difficulty in concluding that the beating and killing of Patillo were sufficiently serious to be actionable under the fourth amendment. Patillo's fourth amendment interest in his bodily security was clearly significant, and his "fundamental interest in his own life need not be elaborated upon." Garner, ___ U.S. at ___, 105 S.Ct. at 1700. Even such weighty individual interests may conceivably be counterbalanced by governmental interests in effective law enforcement. In this case, however, the district court's findings establish that the harms visited on the decedent while in the officers' custody were only minimally, if at all, necessary to enable them to carry out their official duties. The events occurred in an outdoor parking lot in the late afternoon, at a sufficient distance from bystanders to establish that the surroundings posed no particular threat to the safety of the officers. Cf. Wolfish, 441 U.S. at 559, 99 S.Ct. at 1884 (citing safety threats in jails as one possible justification for intrusive searches and seizures). Furthermore, the police had little cause to believe Patillo himself to be dangerous. Given his small size, intoxicated state, and lack of a weapon, he clearly posed little threat to their safety when they initially began escorting him to the patrol car. Finally, as we have pointed out in section A above, the district court's findings of fact establish that Patillo did little to provoke the police officers to beat him. That unwarranted intrusion, as well as the unwarranted shooting which directly resulted from his efforts to escape the officers' further physical abuse, give grounds for relief under the fourth amendment.

III

The plaintiff also alleged, and the district court found, that the City of Atlanta should be held liable under section 1983 for the harms visited on the decedent. The panel reversed on the ground that the court had used an improperly low standard for determining municipal liability. We too reverse the district court, but for different reasons set forth below.

The evaluation of any section 1983 municipal liability claim necessarily begins with an examination of Monell v. Department of Social Services, 436 U.S.

658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In that case, the Court made clear that municipal liability must be predicated on more than a respondeat superior theory. The plaintiff must show that the government employees' unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or else is "visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels." Monell, 436 U.S. at 690-91, 98 S.Ct. at 2036.

Though Monell thus established that the basis for municipal liability could be found in either "policy" or "custom," the Court expressly declined to clarify the nature of the showing required from the plaintiff to implicate the municipality.

The Court deemed it better to defer "further development of this action to another day." Id. at 695, 98 S.Ct. at 2038. The district court attempted to clarify the meaning of the Court's terminology by concluding that municipal liability could be established by a showing that the city exhibited "gross negligence" or "deliberate indifference" in failing to take measures to prevent the unconstitutional actions of its employees. Then, applying that standard to the facts before it,[6] the court determined that the plaintiff had met her burden of proof by showing that the city had negligently failed to give Sampson adequate psychological testing or to retrain him sufficiently upon his return to the police force in 1978.[7] In reversing the district court, the panel rejected the lower court's gross negligence standard. In the panel's view, the city should be held liable only if the plaintiff produced evidence that the constitutional

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[6] When Officer Sampson first joined the Atlanta police department in 1973, he received the standard six week training course then provided at the police academy. A number of citizen complaints were filed against him from 1973 to 1978. His first performance evaluation rated him as "average," except in noting that he should curb his temper and improve his judgment in tight situations. A later evaluation rated him somewhat higher and offered no negative comments. Sampson resigned in 1978, but was rehired later that year with one day of reorientation and no psychological testing.
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Craig, who was hired in 1978, received thirteen weeks of academy training as well as psychological testing. He also underwent eight weeks of on-the-job training followed by six months on probationary status before being permanently hired.

[7] The plaintiff also asserted that the city should be held liable on the ground that it knew that Atlanta police officers customarily used excessive force and condoned such activity. The district court properly found that she had failed to produce sufficient evidence to substantiate those claims.

violators' actions had actually been initiated, or at least implicitly ratified, by those representing official policy.

The cases from this circuit which were cited by the panel do not clearly support the standard of affirmative official ratification which it articulated,[8] and cases from other circuits are in direct conflict.[9] There exists, therefore,

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[8] See Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982); Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982) (cited in Gilmere v. City of Atlanta, 737 F.2d 894, 904 (11th Cir. 1984)).

[9] See, e.g., Tuttle v. City of Oklahoma City, 728 F.2d 456, 459 (10th Cir. 1984) (adopting gross negligence standard), rev'd on other grounds, ___ U.S. ___, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) (the use of gross negligence standard not addressed by a majority of the Court, see, e.g., ___ U.S. at ___ n. 7, 105 S.Ct. at 2436 n. 7 (plurality opinion)); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.), cert. denied, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979). Other courts have adopted a standard of liability which borrows from both ends of the spectrum, permitting a finding of municipal liability where the evidence shows indifference to

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substantial disagreement as to whether gross negligence can suffice to establish municipal liability. We find it unnecessary at this time to state the rule to be followed by this circuit, however, as we find that plaintiff has failed to make out a case against the city even under the gross negligence standard. At most she established that the city failed to train

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(footnote continued from previous page) unconstitutiuonal activity that is so widespread as to permit an inference of actual or constructive knowledge. See, e.g., Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc); Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir.) (en banc), modifying 728 F.2d 762 (5th Cir. 1984) (en banc); Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983); Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983) (sheriff's actual or constructive knowledge of prior similar constitutional deprivations attributable to municipalityi); Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981); Turpin v. Mailet, 619 F.2d 196, 200-01 (2d Cir.), cert. denied, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980). Cf. McLaughlin v. City of LaGrange, 662 F.2d 1385, 1388 (11th Cir. 1981), cert. denied, 456 U.S. 979, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982).

one single policeman properly in the appropriate methods of avoiding the use of deadly force. Even if such failure could be said to be "the moving force of the constitutional violation," as required by Monell, see Polk County v. Dodson, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (quoting Monell, 436 U.S. at 695, 98 S.Ct. at 2038), the plaintiff's proof did not in any case satisfy Monell's further requirement that the failure resulted from a custom that was "so permanent and well settled" as to have "the force of law." Monell, 436 U.S. at 691, 98 S.Ct. at 2036.[10] Indeed, the evidence

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[10] We acknowledge that various courts have concluded that a single constitutional violation by a municipal employee can suffice to establish custom or policy. See, e.g., Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir. 1980); Leite v. City of Providence, 436 F.Supp. 585, 590-91 (D.R.I. 1978). This approach, however, was rejected by the Supreme Court last term in City of Oklahoma City v. Tuttle. Although
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showed that the city had substantially modified its police training procedures subsequent to Sampson's initiation as a policeman in 1974 and that his failure to receive further training upon being rehired

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(footnote continued from previous page) there was no majority opinion on the municipal liability issue in Tuttle, both the plurality and dissenting justices agreed that an isolated shooting by a police officer cannot, by itself, suffice to prove the existence of a city policy or custom. See ___ U.S. at ___ - ___, 105 S.Ct. at 2433-37 (opinion of Rehnquist, J., joined by Burger, C.J., and White and O'Connor, JJ.); 4645-46 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in the judgment).

We recognize that an isolated constitutional violation may lead to municipal liability under § 1983 if there is sufficient independent proof that the moving force of the violation was a municipal policy or custom. "A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims." Tuttle, ___ U.S. at ___, 105 S.Ct. at 2439 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in the judgment). We reach our present decision that the city is not liable under § 1983 not only because
(footnote continued)

in 1978 was an anomaly resulting from his prior service on the police force. Accordingly, we reverse the district court's holding that the city is liable to the plaintiff under § 1983.

IV

Finally, we address plaintiff's claim against various of the police officers' supervisors, including Maynard Jackson, the mayor, Lee Brown, the public safety commissioner, and George Napper, the chief of police. The district court found for these defendants on the ground that the plaintiff had failed to establish the existence of an "affirmative link," as required by Rizzo v. Goode, 423 U.S. 362,

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(footnote continued from previous page) the shooting and beating was an isolated occurrence, but also because the plaintiff has failed to prove that the alleged inadequacy of Officer Sampson's training was the result of a municipal policy or custom within the meaning of Monell.

96 S.Ct. 598, 46 L.Ed.2d 561 (1976), between the death of Patillo and the action or inaction of any of the three supervisors.

We agree. There is no evidence in the record that any of these defendants participated directly in the shooting of Patillo, and although Brown and Napper may have had the right to control the actions of the police officers, they could not be held liable under section 1983 for having "the mere right to control without any control or direction having been exercised...." Monell, 436 U.S. at 694 n.58, 98 S.Ct. at 2037 n.58.

V

The plaintiff also sought damages under several state tort theories, including false arrest, false imprisonment, and assault and battery. The district court rejected each of these claims either because the individual claim lacked merit or because it would have resulted in damages duplicative of those already awarded to the plaintiff under section 1983. In light of our partial reversal, we direct the court to reexamine the state tort claims on remand to determine whether there are now live claims against any of the defendants.

VI

In conclusion, we affirm the district court's holding that Officers Craig and Sampson are liable for beating Thomas Patillo in violation of his constitutional rights, that Officer Sampson is liable for shooting Patillo in violation of his constitutional rights, and that their supervisors are not liable under the federal claims for the officers' misconduct. We

reverse its finding of municipal liability, and remand for further consideration of the plaintiff's state law claims in light of the foregoing opinion. We vacate the award of costs and attorney's fees under 42 U.S.C. § 1988 and remand for further consideration in light of this opinion and the additional proceedings that have taken place since the district court's original awards.

AFFIRMED in part, REVERSED in part, VACATED in part and REMANDED.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part in which RONEY and FAY, Circuit Judges, join in Part III:

I.

This is an action to recover money damages for injuries suffered by a citizen as a result of a tragic encounter with the police. On New Year's Day, 1980, Thomas Patillo drove about the city of Atlanta visiting friends and drinking heavily.[1] He returned home around 5:00 p.m. and pulled into a service station across the street from his house to buy some gas. As he was leaving, he nearly collided with a red van also leaving the station. The two drivers got out of their vehicles and exchanged words. Patillo pulled a handgun from his trunk and threatened the driver, who in turn ran for a telephone and called the police. Atlanta Police Officers C. C. Craig and R. C. Sampson responded to the call. By this time, Patillo had returned home and parked his car in front of his house. The two officers, accompanied by the driver of the van, walked to Patillo's house and knocked on his door. Patillo came to the door, and the driver of the van identified him as the man who had threatened him with a gun. Patillo's friends began to gather about, and the officers decided to question Patillo away from the house.

Officer Sampson grabbed Patillo, who was quite drunk, to steady him as they walked away from the house. When they reached the sidewalk Patillo attempted to flee. Sampson caught him and held him by the back of the belt while Officer Craig grabbed his arm. They decided to take him to their patrol car which was parked in an adjacent parking area. Once again Patillo tried to escape, flailing his arms at the officers. In the ensuing scuffle the officers struck Patillo about the head with their hands a number of times.[2]

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[1] At the time of his death Patillo's blood alcohol content was .27 milligrams percent. A .10 milligrams percent level created a presumption of intoxication under Georgia law. O.C.G.A. § 40-6-392(b)(3) (1982).

The officers eventually got Patillo to their patrol car. As they approached the car, Patillo wrenched himself free and grabbed Officer Craig's holstered revolver. The revolver became dislodged and fell to the ground. Patillo lunged at Sampson, who, fearing that Patillo had the gun, reacted by pulling his revolver and firing two shots into Patillo's abdomen. Patillo died thirty minutes later.

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[2] They either struck him with their open palms or employed moderate force using their fists. There were no marks of any type upon Patillo's scalp, which was bald, face, or neck, however.

The administratrix of Patillo's estate filed suit against Officers Craig and Sampson,[3] seeking the money damages her decedent, Patillo, allegedly would have been entitled to recover had he survived.[4]

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[3] The city of Atlanta, its Mayor, Public Safety Director, and the Chief of Police were also named in the suit. The City allegedly violated Patillo's constitutional rights by promulgating a policy that permitted the deployment of untrained police officers and the use of excessive force in police-citizen encounters. The additional defendants, the supervisors, were allegedly liable because they implemented this policy in a general way. See infra note 9. The district court found the City liable for violating Patillo's fourteenth amendment due process rights. The court, however, found no liability on the part of the supervisors because the plaintiff failed to prove an "affirmative link" between the supervisors' conduct and the constitutional injury, as required by Rizzo v. Goode, 423 U.S. 362, 377, 96 S.Ct. 598, 607, 46 L.Ed.2d 561 (1976).

[4] In Brazier v. Cherry, 293 F.2d 401 (5th Cir.), cert. denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961), the Fifth Circuit acknowledged that the federal civil rights laws do not speak to survivorship of actions, and the courts must, therefore, look to the laws of the states in which they sit to determine if provision is made
(footnote continued)

Proceeding to under 42 U.S.C. § 1983 (1982),[5] plaintiff alleged that the defendants acting under color of state law, subjected Patillo to cruel and inhuman punishment, an unreasonable seizure, and

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(footnote continued from previous page) for the survivorship of a given cause of action. It is undisputed that in Georgia the decedent's claim for damages sustained during his lifetime survives:

> No action for a tort shall abate by the death of either party, where the wrongdoer received any benefit from the tort complained of; nor shall any action, or cause of action, for the recovery of damages for homicide, injury to the person, or injury to property abate by the death of either party. The cause of action, in case of the death of the plaintiff and in the event there is no right of survivorship in any other person, shall survive to the personal representative of the deceased plaintiff....

Ga. Code Ann. § 3-505 (1978).

Section 3-505 is distinct from, and should not be confused with, the Georgia wrongful death statute, which at the time of this suit was codified at Ga. Code Ann. § 105-1301 (1978). The Georgia wrongful death statute creates a new cause of action in certain individuals for the value of the decedent's life. I deal here solely with (footnote continued)

deprived Patillo of his life[6] and liberty without due process of law, in violation of the eighth, fourth, and fourteen amendments.[7]

(footnote continued from previous page) section 3-505, which permits survival of the tort claims the deceased possessed the instant before he died. Accord Brazier v. Cherry, 293 F.2d at 401; Anderson v. Jones, 508 F.Supp. 399 (N.D.Ga. 1980).

As the Georgia Supreme Court put it, section 3-505 provides "for the survival to the administrator of causes of action that exist in the deceased person before his death." Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 238, 104 S.E.2d 208, 213 (1958) (husband's suit under wrongful death statute for death of wife not part of the same cause of action as his suit as administrator under section 3-505 for wife's pain and suffering and medical and funeral expenses). See also Wrongful Death Actions in Georgia, 19 Ga.B.J. 277 (1957).

The district court treated plaintiff's claims as having been brought under the Georgia survival statute and entered judgment for her on that theory. Thereafter, plaintiff objected in a motion to alter or amend judgment, claiming that her complaint also stated a claim for wrongful death. The district court found otherwise in a lengthy written order which I find persuasive and would affirm. Since the trial in this case, Ga. Code Ann. § 3-505 (1978) has been recodified in its entirety as O.C.G.A. § 9-2-41 (1982).

In its dispositive order the district court found the eighth amendment claim meritless. See Ingraham v. Wright, 430 U.S. 651, 659-71, 97 S.Ct. 1401, 1406-12, 51 L.Ed.2d 711 (1977) (eighth amendment

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5. Plaintiff also asserted several pendent state law tort claims. These claims consisted of assault and battery, false imprisonment, and false arrest. The district court denied the assault and battery claim because it was duplicative of plaintiff's section 1983 due process claim. The court denied plaintiff's false imprisonment and arrest claims because the officers had probable cause to detain Patillo.

6. Notwithstanding this allegation, the district court correctly construed plaintiff's complaint as not claiming damages for the deprivation of Patillo's life but only for the deprivation of his liberty. See supra note 4. I therefore limit my discussion to the defendants' alleged deprivation of Patillo's liberty interest.

7. The fourth amendment prohibition of unreasonable seizure was made applicable to the states under the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The eighth amendment prohibition on cruel and unusual punishment was incorporated into the fourteenth amendment by Estelle v. Gamble,
(footnote continued)

rights attach only upon conviction). The district court rejected the fourth amendment claim because the officers had probable cause to detain Patillo. The court, however, found that the officers had deprived Patillo of his liberty without due process of law on two occasions: when Patillo was struck by the officers and when he was shot by Officer Sampson.[8]

(footnote continued from previous page)
429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). For ease of analysis, hereafter I refer to these guarantees simply as fourth and eighth amendment rights.

8. The court held the officers liable for $1,000 in compensatory damages and $4,000 in punitive damages for striking Patillo. In addition, the court held Sampson and the City liable for $20,000 in compensatory damages for the shooting. No punitive damages were assessed because Sampson acted in subjective good faith, believing that Patillo had Craig's revolver in hand, see infra note 17, and the City was immune from punitive damage liability under City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

A panel of this court reversed the district court's judgment as to the officers.[9] The panel affirmed the court's treatment of the fourth and eighth amendment issues, but found that the court erred in finding that Patillo had been deprived of liberty without due process of law, in violation of the fourteenth amendment. The panel relied on Parratt v. Taylor, 451 U.S.

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[9] The panel also reversed the trial court's determination that the City was liable, holding that a showing of gross negligence on the part of the Police Department in training Officer Sampson did not satisfy the standard for municipal liability under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The panel affirmed the district court's refusal to find the supervisors liable and the court's denial of relief on the state law claims for false imprisonment and false arrest. The majority today declines to reach the issue of whether gross negligence satisfies the requirements of Monell because it concludes as a matter of law that the plaintiff did not establish that the City of Atlanta was grossly negligent. I adhere to the panel's view that gross negligence does not satisfy the requirements for municipal liability enunciated in Monell.

527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), which holds that, where a state employee's actions were random and not authorized by state law or policy and the State provides an adequate damages remedy for the deprivation in state court, no fourteenth amendment violation occurs because the State has provided all the process which is due. Since the police officers' conduct was random and unauthorized and Georgia provided an adequate damages remedy for the deprivation,[10] the panel found no fourteenth amendment due process violation.

Subsequent to the panel's decision, the Supreme Court handed down its opinion in Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The Court held that, in a suit for money damages, a finding of probable cause does not end the inquiry as to whether a citizen's seizure was constitutional; the trial court must examine the reasonableness of the manner in which the citizen was seized. Today the en banc court holds that the officers' encounter with Patillo violated the fourth amendment as interpreted by Garner. In addition, the majority creates a substantive constitutional right duplicative of the protections provided by the fourth amendment.

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[10] See supra note 4.

I find that Garner does not counsel a finding of a fourth amendment violation in this case. Moreover, since I view the fourth amendment as the exclusive constitutional vehicle for dealing with seizures of the type involved in this case, I reject the creation of an additional and unnecessary fundamental right addressing such seizures. For these reasons, I dissent.

II.

The majority finds section 1983 liability against the two officers based upon the fourth amendment.[11] The district court and the panel found no fourth amendment constitutional violation in accordance with the law at that time. While it is true that an unreasonable seizure by police officers may rise to the level of a violation of a citizen's fourth amendment rights, the majority's analysis, leading to the conclusions that such a constitutional infringement occurred in this case, is, I submit, flawed.

The Supreme Court, in Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), interpreted the fourth amendment as prohibiting police officers from shooting nondangerous fleeing suspects.[12] The Court began its analysis with the premise that an officer's use of deadly force in apprehending a citizen is a seizure that is subject to the reasonableness requirement of the fourth amendment. Garner represents the Court's first application of the fourth amendment's reasonableness requirement to the use of force by police to detain a person.[13] Thus, the

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[11] The fourth amendment provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....

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[12] Some may read the court's decision in Garner as striking down a Tennessee statute in so far as it authorized officers to shoot nondangerous fleeing suspects. The Court, however, had before it a section 1983 suit for damages arising from a shooting, which required a ruling only on whether the fourth amendment prohibited the officer's conduct. Since the state statute could not cure any fourth amendment violation that might have occurred, its provisions were irrelevant in the Court's analysis of the scope of the fourth amendment.

[13] The Court has made a similar inquiry into a police officer's method of executing a valid search warrant. Dalia v. United
(footnote continued)

mere fact that the seizure was lawful does not end the inquiry; "reasonableness depends on not only when a seizure is made, but also how it is carried out." Tennessee v. Garner, ___ U.S. at ___, 105 S.Ct. at 1699.[14]

(footnote continued from previous page)
States, 441 U.S. 238, 258, 99 S.Ct. 1682, 1694, 60 L.Ed.2d 177 (1979) ("[t]he manner in which a [search] warrant is executed is subject to later judicial review as to its reasonableness."); Terry v. Ohio, 392 U.S. 1, 17-18, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968) ("[a] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."). See also, e.g., Duncan v. Barnes, 592 F.2d 1336, 1338 (5th Cir. 1979) ("[l]aw enforcement officers having a good faith and reasonable belief in the validity of the search warrant may nonetheless incur liability under 42 U.S.C. § 1983 ... if the warrant is executed in an unreasonable manner.")

[14] It is important to note that Garner involved a suit for money damages. Garner does not suggest that, in the context of a criminal prosecution, in which the guilt or innocence of a defendant is at issue, an inquiry beyond the determination of probable cause to seize the defendant is appropriate. The civil context in which Garner arose accounts for the case being
(footnote continued)

Reiterating the traditional fourth amendment method of analysis, the Court determined the reasonableness of the manner in which a seizure was carried out by balancing the degree of intrusion on the citizen's fourth amendment rights, i.e., the degree of force employed in detaining the individual, with the government's interests in effectuating the detention. Id. at ___, 105 S.Ct. at 1699. See also, e.g., Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968). The reasonableness analysis is two-fold, focusing first upon the facts available to the officer, a factual determination, and next, upon the reasonableness of the officer's response, a legal determination.

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Terry v. Ohio, 392 U.S. at 21-22, 88 S.Ct. at 1880 (footnote omitted). Thus, not all governmental intrusions are constrained by the fourth amendment, only those intrusions which are not justified by the circumstances. Schmerber v. California, 384 U.S. 757, 768, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966). See also, e.g., Terry v. Ohio,

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(footnote continued from previous page) one of first impression to the Court, since prior opportunities for fourth amendment interpretation generally arose in the context of a criminal adjudication.

392 U.S. at 9, 88 S.Ct. at 1873 (the right to be free from governmental intrusion is shaped by the context in which it is asserted). Even unreasonable conduct may in some instances not be actionable in a section 1983 suit based upon an alleged violation of the fourth amendment where the injury is too minor to rise to the level of a constitutional violation. Baker v. McCollan, 443 U.S. 137, 144-45, 99 S.Ct. 2689, 2694-95, 61 L.Ed.2d 433 (1979) (plaintiff's three-day detention in jail resulting from a valid warrant, despite his correct assertion that he was not the person against whom the warrant was issued, did not rise to the level of a constitutional violation).

The conduct of the state official or employee must be "sufficiently egregious as to be 'constitutionally' tortuous." Williams v. Kelley, 624 F.2d 695, 697 (5th

Cir. 1980), cert. denied, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 391 (1981) (prison guards' fatal choke hold on a prisoner in order to protect their own safety and maintain order was not sufficiently egregious so as to rise to the level of a violation of the prisoner's eighth amendment rights). See also, e.g., Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (medical malpractice on a prisoner did not constitute a violation of the prisoner's eighth amendment rights when there was no evidence of deliberate indifference to serious medical needs); Hull v. City of Duncanville, 678 F.2d 582 (5th Cir. 1982) (municipal officials' negligent failure to maintain railroad crossing or provide adequate signals, causing an injurious vehicle accident at the crossing, not egregious enough to be constitutionally tortuous); Rutledge v.

Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), aff'd, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983) (a minor battery by a prison guard may not suffice to state a claim under section 1983 based upon an eighth amendment violation). "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." Baker v. McCollan, 443 U.S. at 146, 99 S.Ct. at 2695-96. In the fourth amendment context, the Supreme Court has recognized that relatively minor tortuous conduct by police officers will not negate the constitutionality of a search. See Dalia v. United States, 441 U.S. 238, 258, 99 S.Ct. 1682, 1694, 60 L.Ed.2d 177 (1979). ("[O]fficers executing search warrants on

occasion must damage property in order to perform their duty.") The determining constitutional factor in all such inquiries is whether the police activity was reasonable.

Applying this analysis to the facts in this case, I find that the officers' actions were not unreasonable and did not violate Patillo's fourth amendment rights. There is no question that as Officers Sampson and Craig led Patillo from his house, a "seizure" occurred,[15] implicating the fourth amendment. The issue before us is whether, based upon the circumstances present at the time, the officers' method of effectuating that seizure was reasonable. It is undisputed that the officers had probable cause to make a brief investigative detention under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), once the driver of the red van identified Patillo as the one who had threatened him with a gun. In addition, the constitution permitted the officers to exert reasonable force to effectuate the detention and prevent Patillo's escape. *See* *Garner*, ___ U.S. at ___, 105 S.Ct. at 1699-1700.

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[15] "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985).

The district court found that the officers' use of their hands about the head and neck of Patillo was unnecessary to effectuate the detention. The court, however, failed to extend the inquiry to determine the reasonableness of the seizure in a fourth amendment context, which requires a balancing between the degree of force used to seize the citizen and the government's interest in detaining him. *See* *Garner*, ___ U.S. at ___, 105 S.Ct. at 1699; *cf*. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). While it is true that Patillo experienced some physical discomfort, there is no evidence that he was in any way injured in the altercation; there were no marks of any kind upon Patillo's scalp, face, or back. In fact, Patillo, even though he was drunk, was able to break free from the officers and grab for one of their service revolvers. As already noted, the abuse of governmental power must be sufficiently egregious to raise an ordinary tort by a police officer to the stature of a violation of the fourth amendment. *See* *Garner*, ___ U.S. ___, 105 S.Ct. at 1699-1700. I do not perceive the minor altercation between Patillo and the officers as rising to this level.

In my view the shooting of Patillo, although tragic, did not constitute an unreasonable seizure. The shooting resulted from Officer Sampson's reasonable belief that his life was in danger.[16] As the officers and Patillo entered the area where their patrol car was parked, Patillo broke away and grabbed Officer Craig's holstered revolver; the revolver became dislodged and fell to the ground; Patillo then lunged at Sampson. Officer Sampson knew that Patillo was uncontrollable and could be violent; he knew Patillo was drunk; he knew Patillo had wielded a gun a short time earlier over a simple traffic mishap; in short, he thought his life was in danger. The fourth amendment does not require that "police officers take unnecessary risks in the performance of their duties." *Terry v. Ohio*, 392 U.S. at 23, 88 S.Ct. at 1881. When an officer has cause to believe that a suspect poses a threat of serious physical harm, either to the officer or to others, he does not act unreasonably under the fourth amendment by using deadly force to protect himself. *See Tennessee v. Garner*, ___ U.S. at ___, 105 S.Ct. at 1701. Accordingly, Officer Sampson's shooting of Patillo, though sadly unfortunate, was reasonable in light of the particular circumstances.[17]

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[16] The district court specifically found that Officer Sampson subjectively believed that his life was in danger. Whether Officer Sampson's conduct was objectively reasonable is a question of law subject to plenary review on appeal. *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). *See Turner v. Orr*, 759 F.2d 817, 820 (11th Cir. 1985); *Gulf Tampa Drydock Co. v. Great Atlantic Insurance Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985).

[17] The majority argues that the shooting was unreasonable regardless of whether it was done in self-defense because the officer's own conduct, his earlier treatment of Patillo, provoked Patillo's response. The implications of the majority's treatment of the facts in this case are disturbing. In its view, once an unprovoked contact between a police officer and a citizen occurs, any subsequent

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III.

In addition to finding that the officers violated Patillo's fourth amendment rights, the majority perceives an infringement of his fundamental right, independent of the fourth amendment, to be free from unreasonable and unnecessary force during police-citizen encounters. Although the majority treats this right as rooted in the Constitution, it does not specify its

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necessary measures taken by the officer are automatically tainted by the initial unjustified conduct, regardless of how insignificant and minimal the first contact may have been. Thus, an unjustified push or shove by a police officer would give the "victim" a license to escalate the dispute and retaliate with deadly force. According to the majority, a police officer would be held liable for any act taken to thwart the "victim's" use of deadly force--whether it be directed against the police officer or an innocent bystander--because the harm "largely resulted from [the officer's] own improper use of his official power." *Ante* p. 505. The effect of the majority's factual analysis is to sanction the "victim's" use of deadly force against minor police abuses and to tie the hands of the police officer from protecting himself or others who might be put in danger. Thus, in this case, Officer Sampson could not justify the shooting as self-defense because his earlier conduct made him responsible for all consequences. This is not only untenable, but also contrary to the precepts of the fourth amendment; an officer who uses force in self-defense does not violate the "victim's" constitutional
(footnote continued)

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rights. *Tennessee v. Garner*, ___ U.S. ___, 105 S.Ct. at 7101.

Using the majority's rationale, the ramifications would telescope beyond the bounds of reason. First, under the majority's view, it is irrelevant whether Patillo possessed a gun; even if Patillo had a gun and took aim at Officer Sampson, Sampson's act of self-defense the instant before Patillo pulled the trigger would not be justified because Sampson had in effect become responsible for Patillo's actions. If Patillo had pointed a gun at an innocent bystander in an attempt to stop the alleged police abuse against him and Officer Sampson killed Patillo, Sampson would still violate Patillo's constitutional rights, even though the action was taken to protect the bystander. This is because, under the majority's rationale, such a shooting would be a consequence of Sampson's initial unprovoked contact. It could even be said to follow, consistent with the majority's analysis, that Officer Sampson would be liable for violating the innocent bystander's constitutional rights if Patillo had shot the third party, because the shooting flowed from, and was proximately caused by, Sampson's initial conduct.

origin. This right is not specifically enumerated in the Bill of Rights, and I find no indication in the legislative history that the framers of the fourteenth amendment intended to create it. I therefore view the majority's holding as unwarranted.

The Bill of Rights addresses police-citizen encounters of the sort involved in this case exclusively in the fourth amendment, which evidences the framers' intent to treat such affairs solely under that amendment. The fourth amendment was designed to prevent the abuses of unreasonable searches and seizures occasioned by the infamous writ of assistance, suffered during English rule.[18] This amendment was clearly intended to be the constitutional vehicle regulating police-citizen inter-

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[18] *See* H. Hockett, *The Constitutional History of the United States, 1776-1826*, 74 (1939); 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* 3-5 (1978).

actions.[19] This implies that in drafting an amendment specifically dealing with police-citizen interaction, the framers intended all constitutional analysis involving such encounters to begin and end with the fourth amendment.[20] The passage of the fourteenth amendment does not alter the analysis because there is no indication that police-citizen encounters were to be regulated to any greater or lesser extent under this amendment than under the fourth. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The majority creates this fundamental right under the rubric of substantive due process.[21] In so

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[19] Of course, the Constitution provides, in the fifth and sixth amendments, protections from various abuses in the criminal prosecution context. The analysis in the text focuses solely on those constitutional protections provided prior to the initiation of the criminal judicial process, such as was the case in this instance where the officers merely sought to detain a citizen.

[20] This approach to constitutional interpretation mirrors the longstanding rule in statutory interpretation that expression of certain powers implies the exclusion of others, a principle embodied in the ancient maxim, *expressio unius est exclusio alterius*. *See* 2 A. Sands, *Sutherland on Statutory Construction* § 47.23, at 123 (4th ed. 1973). *See also* *Marshall v. Gibson's Prods., Inc. of Plano*, 584 F.2d 668, 675 (5th Cir. 1978).

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[21] The majority cites as support for the creation of its substantive right Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Rochin involved the State's using as evidence to obtain a convicton in a criminal trial drugs secured by pumping the stomach of the defendant. The issue before the Court was not whether the due process clause created a fundamental right not to have one's stomach pumped, but whether a conviction based on evidence so obtained rendered the trial and conviction fundamentally unfair. Because Rochin arose in a criminal rather than a money damages context, the case does not sanction a court's creation of a fundamental right to support a damage action. Applying ther majority's analysis of Rochin, and putting aside questions of immunity, any state employee who in any way participated in rendering a criminal trial unfair (e.g., by failing to give Miranda warnings, participating in coerced confessions, failing to provide a lawyer, and a host of other constitutional protections in the criminal procedure context) would be momentarily liable under section 1983. Clearly this is an
(footnote continued)

doing it ignores Supreme Court jurisprudence teaching restraint in the use of this doctrine, see Ferguson v. Skrupa, 372 U.S. 726, 731-32, 83 S.Ct. 1028, 1031-32, 10 L.Ed.2d 93 (1963); moreover, the created right merely duplicates the protections provided by the fourth amendment. This is why I conclude that the majority's creation

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(footnote continued from previous page) unacceptable result, which suggests that the majority has read Rochin out of context and inappropriately applied its holding in this case.

In addition, Rochin does not represent an instance where the Court created a substantive right which was not specifically enumeratd in the Bill of Rights. Rochin was decided before the fourth amendment was applied to the states through its incorporation into the fourteen amendment. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The result in Rochin achieved nothing more than would have been the case had the fourth amendment been applied. Rochin, therefore, provides no justification for judicial creations of fundamental rights not specifically enumerated in the Bill of Rights.

of a fundamental right which alternatively addresses the events in this case is unwarranted.

IV.

I would adopt the panel's disposition of this case and reverse the district court's finding of liability on the part of the officers under section 1983. The state assault and battery count should be remanded to the district court with directions to hold the officers liable under the claim and to assess damages against them in accordance with Georgia law.

JOHNSON, Circuit Judge, concurring in part and dissenting in part, in which HATCHETT, Circuit Judge, joins:

I join parts I, II, IV and V of the Court's opinion. I disagree, however, with the Court's treatment of the issue of municipal liability in the case. While

part III of the opinion does not set forth any objectionable principles of municipal liability under Section 1983, it is based upon a mistaken understanding of the evidence produced at trial. I therefore respectfully dissent from the Court's holding in part III.

I. EVIDENCE NEEDED TO PROVE MUNICIPAL LIABILITY

In Monell v. Department of Social Services of New York, 436 U.S. 658, 98 S.Ct, 2018, 56 L.Ed.2d 611 (1978), the Supreme Court interpreted 42 U.S.C.A. § 1983 (West 1981) to make municipalities liable for deprivations of rights secured by the Constitution and laws of the United States whenever the municipality itself subjects a person or causes a person to be subjected to that deprivation. While the city is not liable on a respondeat superior basis, it is liable for deprivations for which it fairly can be blamed. According to the Monell decision, a plaintiff shows that the municipality has subjected him or her to a deprivation if a "custom" or "policy" of the city is the "moving force" behind the deprivation. Id. at 690-94, 98 S.Ct. at 2035-38. Therefore, in order to hold a municipality liable under Section 1983 a plaintiff must prove (1) the existence of a custom or policy, (2) some fault on the part of the city in establishing or tolerating the custom or policy, and (3) a sufficient causal link between the custom or policy and the legal deprivation.

A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. Hearn v. City of Gainesville, 688 F.2d 1328, 1334 (11th Cir.

1983). A custom is a practice that is so settled and permanent that it takes on the force of law. Monell, 436 U.S. at 690-91, 98 S.Ct. at 2035-36. A pattern of injuries is not necessary to show the existence of a custom or policy, for a municipality may deliberately establish a practice that leads to a single deprivation. Provided the requisite fault and causal link are present the municipality may be held liable for the deprivation. See Trezevant v. City of Tampa, 741 F.2d 336 (11th Cir. 1984). Proof of a single incident of unconstitutional activity may be sufficient to impose liability under Monell where proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy which can be attributed to a municipal policymaker. City of Oklahoma City v. Tuttle, ___ U.S. ___, ___, 105 S.Ct. 2427, 2435, 85 L.Ed.2d 791 (1985) (plurality opinion); id. at ___, 105 S.Ct. at 2439 (Brennan, concurring) (Section 1983 cause of action "is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims").

The second element of proof necessary to establish municipal liability has to do with fault. The Supreme Court's interpretation of the legislative history of Section 1983 in Monell is now understood to mean that municipal liability should not be imposed when the municipality was not itself at fault. Tuttle, supra, at ___, 105 S.Ct. at 2433. Hence, a city may not be held liable under Section 1983 for every constitutional violation caused by its policies and customs; the city must be at fault in some sense for establishing or

maintaining the custom or policy. A city can be blamed for establishing a custom or policy if constitutional violations are the foreseeable result of that decision.

Without attempting to define the exact boundaries of the fault standard, it can be said that city policies that are grossly negligent of deliberately indifferent to constitutional rights could lead to municipal liability because constitutional deprivations are the foreseeable result of such policies. See Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981); Owens v. Haas, 601 F.2d 1242 (2d Cir.), cert. denied, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979). While the mere right to control without any exercise of control or direction or any failure to supervise is not enough to support Section 1983 liability, Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); see Monell, 436 U.S.

at 694 n.58, 98 S.Ct. at 2037 n.58; Polk County v. Dodson, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (allegation of administrative negligence fails to state claim under Section 1983), the fact that city officials do not take affirmative actions does not always absolve them of blame, for deliberate inaction can foreseeably lead to constitution deprivations. *Cf*. Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984).

The final element of proof for municipal liability is causation: the plaintiff must show that the municipal policy or custom was the "moving force of the constitutional violation." Monell, supra, 436 U.S. at 694, 98 S.Ct. at 2037. Once a plaintiff has established that a policy exists and that the city is at fault for establishing or maintaining the policy or

custom, there remains only the straightforward task of showing that the deprivation of rights secured by the Constitution or laws of the United States resulted from the policy in question.

II. EVIDENCE PRESENTED IN THIS CASE

The district court in this case held the city liable for the shooting because it had negligently failed to give Sampson psychological testing or training after he was rehired. I agree with the majority that this finding is an insufficient basis for municipal liability, for the improper selection and training off a single police officer did not constitute a settled custom or policy of the city. *Cf*. Berry v. McLemore, 670 F.2d 30, 33 (5th Cir. 1982). Nevertheless, the judgment against the city should only be vacated and remanded to the district court rather than being reversed because the district court failed to make findings regarding evidence presented by the plaintiff that might have established municipal liability under the proper legal standards.

The district court's order states that the plaintiff presented evidence of various aspects of the city's allegedly inadequate selection, training and supervision of officers. In addition to the failure to test and retrain Sampson, the plaintiff presented testimony regarding the city's general failure to administer psychological tests to applicants until sometime before Craig was hired. There was also considerable evidence regarding the city's alleged failure to require officers to carry nightsticks. Despite the availability of various city "policies" upon which to base liability, the order relied exclusively on the failure to test and retrain Sampson:

"Plaintiff alleges a wide range of inadequacies [regarding the selection, training and supervision of officers], but the Court needs to consider only one."

Therefore, the record does not yet reveal whether the proof submitted by the plaintiff was sufficient to establish municipal liability. While one portion of the evidence (the portion relied upon by the district court) was insufficient, factual findings regarding other pieces of evidence have not yet been made. I would vacate the judgment against the city and remand for further factfinding in light of the legal principles discussed above.

JAMES C. HILL, Circuit Judge, dissenting:

In my view this is a procedural due process claim under the Fourteenth Amendment. I do not view this as a Fourth Amendment violation. The seizure had taken place pursuant to adequate cause. The Fourth Amendment specifically addresses police-citizen encounters, but the Fourteenth Amendment yet prohibits police from depriving those who have been taken into custody of life, liberty or property without due process of law.

The claim is asserted for deprivation of a liberty interest. No claim was brought under the Georgia Wrongful Death statue. This interest is protected from deprivation under color of state law without due process by the Fourteenth Amendment.

The primary issue we took en banc was the effect of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) on such a claim.

My view falls somewhere between Judge Vance's relegation of Parratt to claims involving trivial property deprivation and

those who view Parratt as barring all § 1983 claims when state law provides an apparent remedy.

The bar to a § 1983 action under the Parratt rationale does extend to more than cases involving property of small value. Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) involved liberty, as does this case. Yet, I am now persuaded that the mere existence of a state statute said to provide redress for the wrong inflicted under state law will not automatically insulate a wrongdoer from the federal forum. Section 1983 was enacted to provide a federal remedy in those situations where there existed no state remedy and where, in fact, recourse to the state remedy would be of no practical value. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 437, 5 L.Ed.2d (1961).

Section 1983, called the Ku Klux Klan act, was born at a time when inadequacy of recourse to state remedy for the wrongs with which it was concerned could be judicially noticed. It was reborn in the era of state and regional adverse reaction to the implementation of constitutional rights of minorities. State forums could be assumed inadequate to the redress of wrongs inflicted upon civil rights advocates.

Parratt addressed a situation where the court could know that Nebraska's courts were adequate to a claim that a state officer had lost petitioner's $23.50 hobby kit. In Ingraham, the Court was willing to know that Florida law and procedure was acceptable for the vindication of a claim that corporeal punishment (a "paddling") by school administrators had escalated into unlawful assault.

We are instructed by these cases that no § 1983 claim will lie where there is not only state law and procedure "on the books," but it can be known to be adequate in fact. We are also told that, if we know that recourse to state law may not be expected to provide relief, § 1983 may be invoked. Just how we are to acquire that knowledge in cases falling between the environments in several states late in the 19th century (and repeated in the early decades of the second half of the 20th century), on the one hand and Nebraska's views of the deprivation of $23.50 in property in 1981 is not clear. Had Patillo's survivor filed suit for wrongful death (or his administrator for a surviving claim for injury) in the Superior Court of Fulton County, Georgia, would she have found a receptive, adequate forum? To say that the availability of a state remedy is immaterial appears to abide Monroe v. Pape, (a Fourth Amendment violation case) but it seems inappropriate in a due process case to hold immaterial that which was found by the High Court to be controlling in Parratt and Ingraham. Yet, I am not prepared to say that district judges are required to hold hearings and make findings as to the adequacy in fact of recourse to state courts in all of the counties and judicial districts embraced in their federal court districts.

One may find the "bright line" defined by ascertaining what the established state policy is. If the deprivation without due process results from established state policy, the person deprived may invoke § 1983; if it results from random acts of one acting under color of state law, but not in accord with state policy, and a state remedy exists, no federal claim is to be

found. One who has suffered a loss of federally protected rights as a result of action taken pursuant to state policy ought not be relegated to state procedures for redress. Where state policy denounces the infliction of the wrong, its institutions should satisfy due process.

Today such a rule seems the only one available to bring ourselves in line with Parratt and yet afford a federal forum to those for whom state remedies would be of little value. Therefore, I should reverse the judgment against the officers entered upon a finding of their random acts, contrary to state policy. Thus, with the misgivings of one seeking to discern a rule as opposed to following one, I dissent.

OPPOSITION
BRIEF

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1985 ③

NO. 85-1186

R.C. SAMPSON,
Petitioner

v.

EMMA F. GILMERE, individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The judgment and findings below, that the beating and killing of Plaintiff's decedent were constitutional deprivations, is overwhelmingly supported by the evidence and should not be disturbed by this Court.

2. The facts clearly support the findings of the courts below that Petitioner was not entitled to objective good faith or to the affirmative defense of self defense.

3. The issues raised in this petition were not properly raised in the courts below and therefore should not be addressed by this Court.

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2. The facts clearly support the findings of the courts below that Petitioner was not entitled to objective good faith or the affirmative defense of self defense.

3. The issues raised herein were not raised in the courts below and should not be addressed by this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1186

R.C. SAMPSON, Petitioner

v.

EMMA F. GILMERE, individually
and as Administratrix of the
Estate of Thomas E. Patillo
and for the benefit of his
next of kin, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Emm F. Gilmere respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the Eleventh Circuit's opinion in this case. See Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc), as set out in the original petition filed in this case. All references the opinion of the district court are made to the appendices to the original petition and designated as (A___a), referrnces to the trial transcript as (T), and references to the district court record as (R).

STATEMENT OF THE CASE

Thomas E. Patillo, a black, 38 year old male, spent the afternoon of New Year's Day, 1980, visiting various friends and relatives. (A2a). He did some drinking that afternoon (A2a). Late in the afternnon he invited some friends to visit his newly decorated duplex at 1543 Bankhead Highway in southwest Atlanta (A2a). He drove to his duplex in his bluish green Ford with a friend, James Beebe, arriving approximately 5pm (A3a).

Before parking his car next to his house, Patillo stopped at a service station across the street from his house (A3a). After

purchasing gasoline, Patillo pulled out from the station into the street in order to get to his duplex which was directly across the street (A4a). As he did so, a red van swerved around his car (A4a). Patillo then drove his car into a parking lot next to his house (A4a). As Patillo and Beebe were exiting the car the man in the van returned (A4a). Beebe was the only witness to this incident as Patillo is deceased and the man in the van was never identified or found (T105,350). Beebe testified: "And the guy in the red van, he came back up there, and when we got out of the car, the guy started shouting 'hey, man, didn't you see my family inside of the car? You could have killed them.'" (T105). Patillo responded, "Man, I am sorry." (T105). The man said "I be back" (T107). Beebe said they went to the trunk of the car to get some beer out and the man was still yelling "I'll be back" (T107). Beebe said Patillo didn't get upset but that "The only thing I said to him, I grabbed his arm and said, Hey man, come on. That guy he ain't saying nothing." (T129). The man in the van "apparently called the police" (A4a).

The Defendants attempted to put forth a different theory that the man in the van saw Patillo grab a gun out of the trunk (A4a). But the Defendants did not produce such testimony even though the rules and regulations of the deparcment require that the department personnel take down the names of all complainants (T340, Ex. P-10, p. 112). Although there was an alleged tape of the complainant's call, it was never produced at the trial nor was any transcript tendered (T322). The Plaintiff was not able

to locate the man in the van. The Defendants claim the man in the van, although he met with the police officers at the scene, left without giving his name (T350). Officer Sampson did not even get his tag number or otherwise attempt to identify him, he said (T351). The alleged weapon which was supposedly pointed at the man in the van was never found, nor did the police bother to look for it (Swinney's deposition, 37,38, Ex. P-1). Sampson admits that he did not even inquire as to what kind of weapon it was or where it was when the man last saw it (T345). Moreover, Sampson never conducted a Terry search and did not ask Patillo if he had a gun (A6a).

Upon responding to the call the officers refused to tell Patillo and the people in the house why they wanted Patillo (A6a). When Patillo came to the door the man identified Patillo, saying "That is him. He's the one." (A5a). The officer then asked Patillo if he owned the bluish green Ford (A5a). Patillo replied: "Yeah, what is the matter. I ain't did anything." (T9). The officer said he needed to talk to Patillo and Patillo invited him in (T10, 1191). But Sampson refused, saying "No, we will talk to you out here." (T10, 1191). Sampson immediately seized Patillo: "When he stepped out of the door Officer Sampson grabbed him under the left arm" (T11,63,1192). Donald Burden testified the officer "wrestled" Patillo out the door without giving him a chance to come off the steps by himself (T1193). Marvin Lampkin testified: "The police pulled him out of the house and had him jacked up in the back of his pants, and he said, he asked what did

they want him for." (T898). Horton testified they grabbed him in the back as soon as he went out of the door (T941). Contrary to Defendants' assertions the officer's conduct was never described as being polite but at best was "more polite than nasty or rude" (T129,130). Again contrary to Petitioner's assertions, not supported by any citation to the record, it was not until Patillo stepped off the porch that Burden asked "What do you want him for, what do you want to talk with him for?" (T12,133). After they left the porch Sampson said the crowd of people did not interfere and that "we did not have any more problems from that point from the people." (T797).

In his initial statement Sampson characterized Patillo's appearance and demeanor at the door as "drunk" and said he went to the door with the intent to "affect an arrest of the perpetrator of the aggravated assault" (T382,383,1766). At trial he attempted to change his initial statement, saying only Patillo appeared intoxicated and that he went to seek Patillo out only to make a further investigation (T382,383, 1768). This statement was changed upon advice of his attorney when he was being interviewed by the FBI (T1767,1817). But Sampson did say Patillo "was not free to go, no" once they left the porch (T384).

As Patillo was being taken around the corner by the two officers, the trio was watched from various vantage points by six witnesses, five of whom were called by the Plaintiff (A8,9a). Exhibit A-5 is a picture of the parking lot that was taken the night of the shooting before the cars were moved (T1195). This is the parking lot where

Patillo was not only beaten but shot. When shot, he was standing in front of the emblem on the police car (T1195). All the witnesses would have viewed the scene from the angle portrayed in the picture. George Burden, a fifty-three year old truck driver, who never drank, was the closest witness standing to the right of the Camaro pulled beside the police car (T2,15,60,61). He was about ten feet away (T41). His son Donald Burden was standing near the corner of Bankhead and Florence about 20 to 30 feet away (T1200). Marvin Lumpkin worked at the gas station directly across the street (T894). He was twenty-four years old and a graduate of Fulton High School (T894). He viewed the scene from directly across the street at the service station while walking toward the scene, ending up near the corner of Bankhead and Florence (T918). Robert

Horton was nineteen and a high school graduate who lived on Florence Street but at the time was also at the gas station (T936). Patty Burkes, who lived nearby, did not know Patillo, viewed the scene from the corner of Bankhead and Florence about twenty feet from the police car standing near the telephone pole on the corner (T854). She was twenty years old and had three children and had dropped out of school in the tenth grade (T893). With her was her sister, Cheryl Burkes, twenty-two, an employee of the Southwest Health Center (T15, 16).

All the witnesses saw the officers beat Patillo. Patty Burkes, on whose testimony the court below gave special significance (A9a), testified she was no more than thirteen feet away and they were "beating him like that" (T864,873). None of the witnesses say Patillo hit or attempted to hit the officers.

Patillo was 5'9" and weighed 130 pounds and his strength was characterized as moderate (A10a). (Ex. P-21,p.2,T181). Officer Sampson was 5'9" and weighed approximately 150 pounds (A10a)(T389). Officer Craig was approximately 5'6" and weighed at least 250 pounds (A10a)(T1075). The Defendant was .27 drunk (A10a). A forensic chemist from the Georgia State Crime Lab, called by the Defendants, testified that the normal reaction for such a level was a "comatose" state (T1605).

Petitioners misstate the facts in claiming a medical examiner found no recent bruises, scars or injuries of any kind (See Appellants' original Brief, pp. 28,29). In fact, the medical examiner corroborated the witnesses' testimony that Patillo was beaten before he was shot. The autopsy report said: "The left arm medially in the upper portion had a three-quarter inch of fairly recent abrasion". This wound had "seeped a little blood" (Metcalfe, p.11) and was caused by "some kind of moderate blunt force in a tangential direction" (Metcalfe,p.12). The report also found "several abrasions up to one-quarter inch in diamter are present on the knees anteriorly and several bruises up to one-half inch in diameter are present on the right of the knee" (Ex. P-211). These were caused by "some type of blunt force or a scraping effect" (Metcalf, p. 16). There were abrasions and discolorations of the hand that "could have come from a fall, or from a punch with the fist." (Metcalfe, p. 47). The medical examiner also found "some type of blunt force applied to the area between the base of the thumb and the second finger" (Metcalfe,p.48). There were

other bruises and scars suggesting the (decedent) receiving "heavy blows" immediately prior to the shooting (Metcalfe,p. 46,56). Patillo was not bald, however, he did have a small bald spot on the top of his head; nevertheless he was struck on the sides of his head (Ex. p.21).

The officers testified that Patillo never struck or hit them (T410,411). None of the witnesses could be certain that Patillo broke away from the officers as the officers claimed (A13a). Craig and Sampson claimed they could not subdue the struggling Patillo (T423,1080). In spite of this so-called struggle, Sampson claimed "There was no real imminent danger from him as far as his acting at that point." (T406). "The picture did not change until the weapon was drawn" Sampson said (T807). Sampson maintained this story in spite of his own contradictory testimony that Patillo was a fleeing felon, armed with a gun then minutes beforehand and possibly still armed, had committed an aggravated assault and was highly intoxicated or drunk (T807).

The district court simply found the bulk of the officers' testimony unbelieveable (A14a).

Of all the witnesses, only Craig claimed that in the struggle a winter jacket he was wearing was pulled off over his head (A13a)(T85). Even Sampson did not see this. The witnesses saw Craig pull the jacket off and throw it to the ground after the shooting (T909,1203). They also saw bullets after the shooting that were not on the ground before the shooting (T909, 1203). Craig said that when Patillo fell face down after he was shot that he fell on Craig's jacket. This statement was not

corroborated by any witness nor physical evidence such as blood on the jacket (T1144, 1150). The jacket was returned to Craig that night by the detective in charge and was not sent to the Crime Lab (T1167). Immediately before the shooting itself, George Burden, Marvin Lumpkin and Robert Horton saw Craig push Patillo towards Sampson (A13a) (T906,976). Patillo had his hands down (T951,1199). At this point, they saw Sampson draw his revolver and shove it into Patillo's abdomen and then heard two shots (T18,907,976,1196). Lumpkin, Horton, Donald Burden and George Burden were able to view Patillo's hands continuously and never saw him hold a gun (A14a)(T18,908,951, 1199).

Craig and Sampson claim that during the struggle Patillo put his hand on Craig's gun while still strapped in Craig's holster (T1094,1105). Each claimed they grabbed

Patillo's hand before he was able to pull the gun out but that Patillo overcame their efforts as well as the strap on the gun (T424,1105). When the gun came out, Sampson said he let go of Patillo's hand on purpose. "It was giving Craig more flexibility that possibly could keep somebody from getting hurt." (T427). Craig claimed he pushed Patillo's left arm with the weapon up and let Patillo go (T439,1109) and fell to the ground, crawling eight to eleven feet to get underneath the back of the patrol car (T1117,1806). No other witnesses, not even Sampson, saw Craig crawl underneath the car. Sampson claims he saw Craig push Patillo's arm back and that the arm the gun was now in was somehow the right hand (T429), whereas Craig claimed Patillo grabbed the gun with his left hand (T1111). Sampson said "As I am watching the arm going up and

I am reaching for my service revolver." (T444). He continued "And as the weapon came down, I would say I am coming up to level as it is coming down" (T445). Sampson said he did not know where Craig was at this time and was not absolutely positive that the gun in Patillo's hand was pointed at him (T445). Nor could Sampson explain how Patillo could have grabbed out the gun backwards from its holster, saying "I can't demonstrate that" (T790).

At this point Sampson admits he pulled his gun and fired, claiming to be 3 or 4 feet away from Patillo (T446). But the medical testimony (Metcalfe, pp. 22,24, 48,49) as well as the physical evidence (T1265,1285) and the testimony of the witnesses was that one shot was fired from point blank range and the other from one foot (T5,354)(Ex.P-21). Moreover, Sampson testified he fired the weapon upwards at Patillo (T445,450) and said he was falling backwards when he fired (T1763) but the physical evidence shows his barrel was pointed downwards (T1283) which is consistent with the witness' testimony that he shoved the gun in Patillo's abdomen and fired (T1196).

No physical evidence corroborated the officers' singular statement that Patillo had a gun. Although an Atlanta policeman checked Craig's gun for fingerprints that night, none of Patillo's prints were found on Craig's gun (T1728). But the Atlanta police department did not check for signs of Sampson's and Craig's prints on the gun which may have verified a struggle with the gun (T1734). All other evidence, including Sampson's gun, was turned over to the Crime

Lab, but Craig's gun was not (T1298). The Crime Lab tests showed, on Patillo's hands, elevated levels of barium and lead, two out of the three components of gunshot residue and that such evidence was consistent with Patillo having his hands near such a weapon when fired or with handling a weapon recently (Metcalfe, p.37)(T1340). A finding of the third element, antimony, (a metallic element), associated with the gun itself, would have been conclusive as to Patillo's holding a gun (T1295). Both hands had "almost equivalent levels of barium and lead" (T1319). Also, the barium and lead from Patillo's hands could have come from a gun he fired the night before (T1210,1323).

Based on these facts the court construed the conflicting testimony and specifically rejected the testimony of the officers (A14a).

The court specifically found that the officers beat Patillo before they killed him:

> The court has found, however, that both officers were not merely holding on to Patillo's struggling arms, as they testified, but were striking Patillo with little or no provocation by the time they reached the back of the patrol car. Thus, they applied more force than was necessary to control Patillo, but rather out of irritation at his initial resistance to question him. (A33a,37a).

As to the beating the court found these officers were not entitled to the good faith immunity defense (A39a,40a,41a).

> The court bases its conclusion on the lack of independent evidence that this beating was provoked by Patillo and on its observation of the officers as they testified. Because they lacked both subjective and objective good faith, Craig and Sampson cannot assert the good faith immunity defense regarding their actions in striking Patillo. (A39a).

The court rejected the officers' testimony that Patillo had grabbed a gun noting that the eight other witnesses had

not seen a gun in Patillo's hand (A13a,39a). The court found that when Patillo was pushed or lunged toward Sampson, that Sampson "reacted by drawing his own revolver and shooting Patillo twice at close range in the abdomen" (A14a).

As to this shooting the court found that Sampson was acting in "subjective good faith" when he shot Patillo because "the court accepts Sampson's testimony that he felt himself to be in some danger" (A39a). But the court found objective good faith lacking because the perceived threat was "not reasonable" both under the facts and "in light of the clearly established law" (T394). The court found "Two younger, larger officers trained in the use of non-deadly force had other options at this point." (A39a-41a).

Plaintiff supported her case by the expert testimony of James J. Fyfe, an expert in the area of police training and procedures (T459). Fyfe was an Associate Professor at American University and was affiliated with the Police Foundation in Washington, D.C. (T459). Fyfe had been a policeman over fifteen years, including a beat cop for eight years (T459). Fyfe has a Ph.D. in Criminal Justice from the State University in Albany, New York (T459).

Regarding the use of deadly force, Fyfe cautioned:

> "I don't think we can look at the shooting at the instant that the officer pulls the trigger. It is a process that begins when he becomes aware that he may confront a potentially violent individual, and everything he does from that point on helps to determine the outcome of the sooting." (T534).

Fyfe testified that he studied the training program for Atlanta policemen and that

he had studied the facts of this case (T535). Fyfe testified that it was his opinion that the deadly force training by the Atlanta Police Department did not conform to generally accepted principles and standards in this area (T542). Fyfe also testified that the overall training was "inadequate" (T549). Fyfe also cited other deficiencies in Atlanta's training program, most notably that there was no follow-up or continuing training (T618), there was no in-service training (T620) and there was no monitoring of the implementation of the training in the field or feedback to the Academy (T620). Even though the curriculum had changed since Sampson was trained Fyfe noted there had been no attempt to bring Sampson's level of training up (T562). Fyfe also noted that Sampson admitted training deficiencies but that the Department did not have any procedure in effect for identifying and correcting such training deficiencies (T564).

Fyfe also testified that it was the generally accepted standard that all policemen carried nightsticks at all times (T588). Fyfe noted that the Atlanta Police Department policy on batons was therefore not in conformity with the accepted standards (T584). The court specifically noted "The alleged failure to clearly require officers to carry their nightsticks at all times" (T399). The court further found:

> "Under these circumstances non-deadly force should have been sufficient to confront Patillo. The officers, of course, had deprived themselves of one effective option by leaving their nightsticks in their patrol cars." (R393).

Fyfe testified that even if the officers' statements were true that there were

numerous alternatives available for subduing Patillo short of using deadly force (T608). Fyfe testified that the policemen should have used restraining holds or come-along holds (T608). "If those were unsuccessful, the officer should then resort to their batons." (T608). But department policy did not require them to have their nightsticks (T289,1498). Sampson did not know the policy (T289).

REASONS FOR DENYING THE WRIT

1. The factual findings below overwhelmingly support the district court's conclusion that the beating and killing were substantive constitutional deprivations.

A finding of fact, amply supported by the record, is binding on this Court. Bantam Books, Inc. v. Sullivan, 83 S.Ct. 631 (1963). Rule 52(a), F.R.C.P., requires the reviewing court to accpet the fact findings of the district court unless they are "clearly erroneous." United States v. United States Gypsum, Company, 68 S.Ct. 525 (1948).

> Findings are 'clearly erroneous' where such findings are without substantial evidence to support them, where the district court misapprehended the effect of the evidence, and if the force and effect of testimony considered as a whole discloses that the finding is so against the great preponderance of the credible testimony that it does not reflect the truth of the case.

Merchants National Bank of Mobile v. Dredge General G.L. Gillespie, 663 F.2d 1338, 1341 (5th Cir. 1981). "in the absence of clear error, the evidence must be viewed in the

light most favorable to the party who prevailed below." Fireman's Insurance Company of Newark, New Jersey v. Robbins Coal Co., 288 F.2d 349 (5th Cir. 1961).

The Petitioners admit that the actions of the Defendants in beating, shooting and killing Patillo did establish tort violations, but argues that these actions did not rise to a constitutional deprivation. In doing so Petitioners ask this court to completely disregard numerous factual findings by the district court that are overwhelmingly supported by the evidence. The court unmistakeably found that the initial beating was unprovoked, was unnecessary to control the deceased and was donely out of irritation to the decedent. (A9a,10a). The court rejected the officer's testimony as neither the physical evidence corroborated their story nor did the testimony of any of the eyewitnesses (A14a,18a,39a). That the gun fell to the ground during the scuffle is certainly a permissible inference from the evidence, although not Plaintiff's theory (A14a). As the court below did find: "None of the witnesses saw Patillo reach for Craig's revolver, and none of them saw a gun in Patillo's hand at any time " (A13a). hether it fell there during the officers beating of Patillo or was placed there after the shooting as part of an alleged cover-up is not material. As the court found, the shooting was unreasonable under the facts of the case and in light of clearly established law (A33a,34a38a,40a).

"Except as to testimony which is inherently incredible, the Courts of Appeal do not substitute their judgment for that of the trial court or the jury in the exercise of credibility choices." Dillon v. M.S. Oriental Inventor, 426 F.2d 977,978 (5th

Cir. 1973). Where the trial court has decided to weigh the evidence more heavily for the Plaintiff, a choice between two permissible views of the weight of the evidence is not clearly erroneous." Dickens v. United States, 545 F.2d 886, 890 (5th Cir. 1977), United States v. Yellow Cab Co., 338 U.S. 38,341 (1949).

Petitioner Sampson maliciously beat the deceased without any provocation and then in the heat of his anger shoved a gun in the deceased's stomach at point blank range. Any danger that Sampson perceived was unfounded and if it existed was created by him. Therefore this case is not in conflict with Young v. City of Killen, Texas, 775 F.2d 1349 (5th Cir. 1985)

In fact this case is controlled by Tennessee v. Garner, ____U.S.____, 105 S.Ct. 1694 (1985), where the Court arrived at a standard defining the reasonable use of deadly force to seize a person:

> (Where a police officer) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has commited a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. id. 105 S.Ct. at 1701.

Certainly under these standards the unprovoked beating, shooting and killing of an unarmed citizen would shock the conscience of any court of jury and therefore violate substantive due process. Implicit in the district court's findings are that the beating, shooting and killing violated the Tennessee v. Garner standards. As to the beating the district court said:

> After balancing the Williams factors, the court concludes that Sampson and Craig employed force so excessive as to give rise to section 1983 liability. (A35a).

As to the killing the illing the district ourt found:

> The injury to Patillo, of course, was the ultimate possible injury. The degree of force applied, furthermore, far exceeded the amount of force required under the circumstances (A34a).

In assessing these substantive due process violations the district court specifically relied on Williams v. Kelley, 624 F.2d 695 (5th Cir. 1980), cert. den. 451 U.S. 1019 (1981) and Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1972), cert. den. 414 U.S. 1033 (1973).

The district court specifically found that there was no reason to believe that the deceased was armed or that he was reaching for a gun. The non-passive act found by the court was his lunging forward in reaction to the beating he was receiving. None of the elements cited in Tennessee v. Garner, supra, were present, as the deceased did not pose a threat of serious physical harm, did not actually threaten the officers with a weapon, and force was not necessary to prevent escape. Therefore this case is consistent with recent circuit court decisions regarding the use of deadly force. See Acoff v. Abston, 762 F.2d 1543 (11th Cir. 1985) and Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985).

2. Self defense and good faith are simply not issues in this case and were accordingly rejected by the courts below.

As argued above, under the standards set forth in Tennessee v. Garner, supra; Williams v. Kelley, supra; Johnson v. Glick, supra, clearly established law and police practice precluded the use of any force in this case, especially the use of deadly force. Thus, the district court's findings that the officers lacked objective good faith is overwhelming supported by the evidence (A37a-41a). Under Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982), this should have ended the inquiry. But the district court applied the pre-Harlow test as set out in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1976). Thereunder, if the officers lacked either subjective or objective good faith they would not be entitled to the good faith defense. id. 420 U.S. at 321. Sampson's belief here that he was in danger and that deadly force was called for was not reasonable because "Sampson had no to believe that Patillo was armed" and "two younger larger officers trained in the use of non-deadly force had other options at this point." (A40a,41a). Therefore at the time of the district court's ruling this Court had done away with the subjective compnent of good faith. Harlow, supra, 457 U.S. at 816. And under the Harlow, standard the district court's finding that Sampson lacked objective good faith must be sustained as Sampson clearly violated statutory and constitutional rights that a reasonable person would have known. id. 457 U.S. at 819.

Likewise, this Court's most recent pronouncement regarding the good faith defense supports the Respondent.

Malley v. Briggs, ____U.S.____, 38 Cr.L. 3169 (No. 84-1586) (1986). "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that (deadly force was not warranted)" id. ____U.S. at ____, 38 Cr.L. 3171.

Even under pre-Harlow law the fact that Sampson perceived himself in"some danger" did not clothe him with subjective good faith, as being in some danger does not entitle one to use deadly force. See Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978). The subjective element was negated by the presence of "malicious intent" (A40a), citing Wood, supra, 420 U.S. at 321. On direct appeal Respondent argued that the district court's finding of subjective good faith was clearly erroneous. The district court found that just seconds before the shooting, the officers lacked objective and subjective good faith in in beating Patillo, because "the blows were not delivered in a good faith effort to control Patillo but rather out of irritation at his initial resistance to their efforts to question him." (A39a). This presence of malicious intent deprived them totally of the good faith defense. Williams v. Treen, 671 F.2d 892,896 (5th Cir. 1982). Moreover, since the district court found that Patillo had no gun and that Patillo posed no threat to him, then Sampson had no reason for drawing and firing his weapon. Pierson v. Ray, 386 U.S. 547 (1967); Carr v. Bell, 492 F.Supp. 832 (N.D. Fla. 1980), aff'd 452 U.S. 713 (1981).

> (Malicious intent may be shown by proof) that an official either actually intended to do harm to the plaintiff, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result. The spirit of the rule reaches nonfeasance as well as misfeasance. It does not insulate an official who, although not possessed of any actual malice or intent to harm, is so derelict in his duties that he must be treated as if he in fact desired the harmful results of his inaction.

Bogard v. Cook, 586 F.2d 399,412 (5th Cir. 1978), cert. den. 444 U.S. 883 (1979).

The defendants had the burden of proof in establishing this defense. Gomez v. Toledo, 446 U.S. 635 (1980). But the Petitioners have failed to support the requisites of the good faith defense, to wit, the state of the law, whether the defendants relied on any rlevant legal authority and whether they took any reasonable steps to determine the legality of their actions. Harlow, supra, 457 U.S. at 818.

However, the issue here is one of credibility, not good faith, as the defendants did not concede that a constitutional violation occurred but simply asserted that the defendants were acting in full compliance with police procedures. See Furtado v. Bishop, 604 F.2d 80, 96 (1st Cir. 1979). Sampson's mistake in assessing the situation is by definition unreasonable and deprives him of the good faith defense. Wood, supra, 420 U.S. at 322; Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981).

Self defense is simply not an issue in this case. Assuming that one believes the officers' version of the shooting, which the district court specifically rejected, self defense is not available in a civil or criminal action to anyone who is the aggressor, or one who initially provokes the use of force with intent to use such force as an excuse to inflict bodily harm upon the assailant. Official Code of Georgia Annotated 16-3-21 (b)(1) (Michie 1982); Spradlin v. State, 151 Ga. App. 585 (1979). As the

en banc court found in Gilmere, supra,774 F.2d at 1501:

> Here,however, any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse. We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power.

See generally, 6 A.C.J.S. Assualt and Battery, Sections 19b, 21.

3. The issues raised herein were not raised in the courts below and therefore should not be addressed by this Court.

Issues not presented and addressed by the lower courts are not normally reviewable by the Supreme Court. Singleton v. Wulff, 428 U.S. 106 (1976). The exceptions are where the proper resolution is beyond any doubt or where injustice might otherwise result. id. 428 U.S. at 121. "Suffice it to say this is not such a case." id. 428 U.S. at 122.

The Parratt issue or the substantive due process issue was injected into this case at oral argument by the original circuit panel on the basis that this defense was still in the case because the defendants had pled the defense of failure to state a claim. Nor was the affirmative defense of self defense raised in the trial court. In a post trial brief the Petitioners did argue Parratt prohibited simple negligence as a basis of liability.

These arguments now constitute defenses not pled or put in issue at trial by the Petitioners and therefore should not be considered by this Court. Youakim v. Miller, 425 U.S. 231 (1976); Wiley v. Offshore Painting Contractors, Inc., 711 F.2d 602, 608 (5th Cir. 1983).

The Petitioners raised only two issues in their briefs before the original circuit panel. The first issue was whether the city policies and practices of selecting and training its officers could support municipal liability. (Panel brief of Petitioners-Respondents, pg. 12). The second issue concerned only whether "Sampson forfeited his qualified immunity defense through a lack of objective good faith." (id., pg. 23).

"(M)atters raised for the first time on appeal will not be considered. " Singleton v. Armor Velvet Corp., 621 F.2d 180, 183

(5th Cir. 1980). Any issue not assigned as error and briefed is considered waived in the reviewing court. United States v. Philadelphia National Bank, 83 S.Ct. 1715 (1964).

CONCLUSION

Therefore, for the reasons argued above, and because there are alternate bases for upholding the judgment below as argued in the Court of Appeals (United States v. American Ry. Express Co., 265 U.S. 425,438 (1924)) this Court should deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of this Response, by mail, upon:

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This the _____ day of April, 1986.

J.M. Raffauf

AMICUS CURIAE

BRIEF

2

Supreme Court, U.S.
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CLERK

No. 85-1186

In The

Supreme Court of the United States

October Term, 1985

R. C. SAMPSON,
Petitioner,

vs.

EMMA F. GILMERE, Individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE
BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF GEORGIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Attorney General of the State of Georgia submits this brief pursuant to Supreme Court Rule 36.4. The Attorney General, as the chief legal officer of the State of Georgia and as legal representative for executive departments, represents law enforcement, correctional and other state officers whose conduct may be the subject of 42 U.S.C. § 1983 litigation.

The order of the United States Court of Appeals for the Eleventh Circuit entered on October 15, 1985, found that the use of deadly force by a police officer taken in self-defense during a lawful detention violated the detainee's substantive due process rights and violated the Fourth Amendment's prohibition against unlawful seizures.

This order conflicts with a recent decision of the Court of Appeals for the Fifth Circuit[1] and extends rights not previously recognized by this Court.

Accordingly, the Attorney General, believing the Court of Appeals for the Eleventh Circuit to be in error, desires this Court to settle this important question of federal law by issuing its Writ of Certiorari to review the October 15, 1985, decision of the United States Court of Appeals for the Eleventh Circuit.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Eleventh Circuit should be reversed. The court of appeals' decision determined that a § 1983 action may be based upon a substantive due process violation even under circumstances when a police officer acts under the subjectively reasonable belief that a detained suspect poses a threat of serious physical harm. In arriving at this decision the court found, in effect, that the officer forfeited his right to use deadly force because of the court's determination that the officer committed a previous substantive due process violation in dealing with the suspect. The finding of the previous substantive due process violation by the court of appeals from the factual record in this case is in conflict with the substantive due process analysis factors adopted in *Johnson v. Glick,* 481 F.2d 1028, 1033 (2nd Cir. 1973), *cert. denied,* 414 U.S. 1033 (1973), and is inconsistent with the recent decision of the Court of Appeals for the Fifth Circuit in *Young v. City of Killeen, Texas,* 775 F.2d 1349 (5th Cir. 1985).

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[1] *Young v. City of Killeen, Texas*, 775 F.2d 1349 (5th Cir. 1985)

The court of appeals also found that the shooting of the suspect was an illegal seizure within the meaning of this Court's holding in *Tennessee v. Garner,* — U.S. —, 105 S.Ct. 1694 (1985). The court of appeals completely ignored the factual distinction in *Garner, supra,* which involved the use of deadly force towards a nondangerous, unarmed, escaping suspect and the use of deadly force in self-defense involved in this case. The court of appeals' conclusion in this case is an unwarranted, if not inconsistent, extension of this Court's holding in *Garner.*

Accordingly, review of the decision of the court of appeals by this Court is warranted.

ARGUMENT

The eleventh circuit *en banc* decision avoided the limitations on actions filed pursuant to 42 U.S.C. § 1983 set down by this Court in *Parratt v. Taylor,* 451 U.S. 527 (1981). In *Parratt* this Court held that a due process clause violation was not stated when, although an agent acting under color of state law deprived the respondent of property, the deprivation was a random, unauthorized act, not sanctioned or approved by the state and where there were adequate state law remedies available to the respondent. *Parratt, supra* at 543, 544.

In the present case the actions of Atlanta Police Officers Sampson and Craig, to the extent that they violated any rights of Thomas Patillo, were also random, unauthorized and unapproved by any superior authority. Also, there were available adequate state law tort remedies. The court of appeals skirted this Court's concern in *Parratt, supra* at 544, and *Paul v. Davis,* 424 U.S. 693, 701 (1976) that all state tort claims could become constitutional violations under § 1983, by holding that liability under § 1983 could be found under two new constitutional theories not considered in *Parratt.*

THE COURT OF APPEALS' FINDING OF SUBSTANTIVE DUE PROCESS VIOLATIONS IS IN ERROR AND CONFLICTS WITH COURT OF APPEALS DECISIONS IN *YOUNG V. CITY OF KILLEEN, TEXAS*, 775 F.2d 1349 (5th Cir. 1985) AND *JOHNSON V. GLICK*, 481 F.2d 1028 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

The court of appeals' first theory was that the action of Officer Sampson in shooting Patillo, while the officer was under the subjectively reasonable apprehension of bodily injury, violated Patillo's substantive due process rights. The district court made factual findings that while the two officers were together in a position where the other witnesses were not able to see clearly, Patillo reached for Officer Craig's revolver. A scuffle ensued and the revolver was knocked to the ground. Patillo then lunged toward Officer Sampson who drew his revolver and fired two shots at point blank range.

At the time of the shooting Officer Sampson knew that Patillo had been identified as the person who a short time earlier had threatened a citizen with a hand gun after a minor auto incident, that Patillo was agitated and had broken free from the officers twice, that Patillo had struggled to get Officer Craig's gun, and that Patillo was now lunging toward Officer Sampson.

It is hard to imagine a factual circumstance where self-defense, including the use of deadly force, would be more clearly justified.[2] To get around this problem the court of appeals found a separate substantive due process violation which it used to bootstrap Officer Sampson's use of deadly force into a substantive due process violation. The district court found that the officers struck Patillo while they were escorting him away from the crowd. The striking took place after Patillo first broke loose from the officers but immediately prior to Patillo lunging for Officer Craig's gun. The striking was not done with a weapon and no evidence of injury to Patillo's bald head, face or neck was found to exist. The court did find little, if any, justification for the striking by the officers. The court of appeals, citing *Rochin v. California*, 342 U.S. 165 (1952) and its progeny, found that the unjustified striking of Patillo by the officers rose to the level of a substantive due process violation. The court of appeals purported to apply the standards in *Glick, supra* at 1033, in making its determination. There Judge Friendly stated:

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need

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[2] In *Tennessee v. Garner, supra* at 1701 this Court said, "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Clearly, if there is an immediate threat to the officer, his authority to use deadly force is not more restricted than it would be to prevent an escape. There is no contention in this case that the detention itself was unjustified.

> for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

In applying these guidelines to the facts in the present case there is little to base a substantive due process violation on. Admittedly there was little need for the use of force in handling Patillo in light of the fact that he was intoxicated and there were two officers to handle him. On the other hand it is obvious that the amount of force used was slight as well. Patillo in fact was able to break free of the officers on two occasions. In addition there were no marks anywhere on his person from whatever striking occurred. The extent of injury inflicted was little or none. It is clear that the officers were trying, unsuccessfully, to maintain control of Patillo. Although the striking may have been unjustified, the slight amount of force used and the fact of little or no injury being inflicted tend to dispel any possibility of finding malicious or sadistic intent.

When comparing these facts to those in *Glick,* where an officer struck a man in a holding cell with a weapon and then intentionally denied him medical assistance for a period of four hours, the present case clearly falls far short of a substantive due process violation by the *Glick* standards. Nevertheless, the court of appeals found a substantive due process violation from these facts and then used that violation to find the officer's action in self-defense to be unjustified. The court's conclusion conflicts with *Young v. City of Killeen, Texas, supra,* which was decided on a similar set of factual circumstances by the fifth circuit. Hence, there is already disagreement among

the circuits as to the scope of substantive due process theory in § 1983 actions.

THE COURT OF APPEALS MISAPPLIED THIS COURT'S RULING IN TENNESSEE V. GARNER BY FINDING THAT A POLICE OFFICER ACTING IN SELF-DEFENSE HAD CONDUCTED AN UNREASONABLE SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT AND GIVING RISE TO A § 1983 ACTION.

The court of appeals' alternative theory for finding § 1983 liability is that Officer Sampson's shooting of Patillo was an unreasonable seizure in violation of the Fourth Amendment within the meaning of *Tennessee v. Garner, supra.* This analysis completely ignores the important factual distinction between *Garner* and the present case. In *Garner* the shooting of the suspect was the seizure involved. This Court determined that the use of deadly force to apprehend an escaping unarmed felon is constitutionally unreasonable "[w]here the suspect poses no immediate threat to the officer and no threat to others. . . ." *Garner, supra* at 1701. In the present case the suspect had been apprehended earlier and the use of deadly force was applied only at the moment that the officer perceived an immediate threat to his own safety. The court of appeals' finding of a Fourth Amendment violation is unsupported, if not in conflict with this Court's ruling in *Garner.*

* * *

CONCLUSION

For the foregoing reasons, this Court is requested to issue its Writ of Certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit issued on October 15, 1985.

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